

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 IN RE: AMERICAN EXPRESS ANTI-STEERING

4 RULES ANTITRUST LITIGATION (II) 11-MD-02221-NGG-RER

5 -----x
6 THE MARCUS CORPORATION, on behalf of
itself and all similarly situated persons,

7 Plaintiff, 13-CV-07355-NGG-RER

8 versus

UNITED STATES DISTRICT COURT
BROOKLYN, NEW YORK

9 AMERICAN EXPRESS COMPANY, et al.,
10 Defendants.

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11 SEPTEMBER 17, 2014
10:00 A.M.

12 TRANSCRIPT OF FAIRNESS HEARING
13 BEFORE THE HONORABLE NICHOLAS G. GARAUFIS,
14 UNITED STATES DISTRICT COURT JUDGE

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Proceedings

1 THE COURT: Please be seated.

2 THE CLERK: Civil cause for a fairness hearing.

3 Lead counsel for the parties state your appearances.

4 MR. FRIEDMAN: Gary Friedman for the class
5 plaintiffs. Good morning, your Honor.

6 THE COURT: Good morning.

7 MR. KOROLOGOUS: Good morning, your Honor. Philip
8 Korologous for American Express.

9 THE COURT: Good morning. All right. And?

10 MR. CANTER: Your Honor, Michael Cantor for the
11 objectors, Target and National Retail Federation.

12 THE COURT: All right. As we get to the objectors'
13 portion of the fairness hearing, we'll have you state your
14 appearance again for the court reporter.

15 All right. This is a fairness hearing regarding the
16 class settlement agreement in In Re American Express
17 Anti-Steering Rules Antitrust Litigation, 11-MD-2221 and
18 Marcus Corporation versus American Express Company,
19 13-CV-7355.

20 We're going to proceed today in accordance with the
21 order that I issued recently beginning with the proponents of
22 the approval of the agreement. First class plaintiffs,
23 Mr. Friedman will speak first and then I understand on behalf
24 of AmEx, Mr. Korologous you're going to speak second.

25 MR. KOROLOGOUS: That's correct, your Honor.

Mr. Friedman

1 THE COURT: And you're allotted 60 minutes and we
2 have a timer. And you are, of course, permitted to use less
3 time than you're allotted. But you are certainly permitted to
4 use as much time as you're allotted.

5 Is there anything we need to do before we begin the
6 presentations? Hearing nothing, let's start on behalf of the
7 class plaintiffs. Mr. Friedman.

8 MR. FRIEDMAN: Good morning, your Honor.

9 THE COURT: Good morning.

10 MR. FRIEDMAN: Gary Friedman for the class
11 plaintiffs.

12 Ten years ago, the Marcus Corporation filed suit
13 against American Express. Marcus turned to the legal system
14 and the antitrust laws to try to find some way to control
15 their payment card acceptance costs because normal market
16 forces were not working. If someone had told Marcus at that
17 time that we would be standing here today one fairness hearing
18 away from merchants in the United States having the right to
19 impose surcharges on credit card transactions, not just on
20 AmEx but also on Visa cards, on MasterCard cards, on Discover
21 cards for the first time ever in US history, Marcus would have
22 been thrilled.

23 Thrilled because the settlement agreement here today
24 provides Marcus and 6 million other merchants with
25 unprecedented opportunities to control those card acceptance

Mr. Friedman

1 costs by recouping the fees that they paid to the credit card
2 networks, by driving transaction volume to debit which is far
3 cheaper, by driving transaction to cash also by driving
4 transaction card volume to other credit card brands on which
5 the consumer is not responsible for paying a surcharge. And
6 I'll unpack all of that here in my remarks this morning.

7 Ten years ago, the idea of being able to surcharge
8 credit cards in the United States seemed farfetched. In
9 Australia, the experiment with credit card surcharging was in
10 its earliest infancy. And all the merchants there, all the
11 large merchants were saying they will never do it, it'll never
12 take hold. The Australian Retail Federation in its
13 submissions pre-reform to the Reserve Bank of Australia said
14 that it is totally unrealistic to expect that merchants will
15 take up surcharging in Australia, it won't happen, the quote,
16 competitive forces amongst merchants with key surcharging
17 could ever, catching on. And that sounds a lot like what
18 we're going to hear here, from the objecting merchants, from
19 some of the objecting merchants.

20 And here at home, the idea of surcharging just
21 seemed like a pipe dream. You had the Visa no surcharge rule,
22 the MasterCard no surcharge rule, Discover had a rule back
23 then, and there's the AmEx rule. On top of that, there were
24 ten state statutes, the enforceability of which no one ever
25 doubted and which no one had any incentive to challenge,

Mr. Friedman

1 whether in the courthouse or the state house, because of all
2 those network rules.

3 So for a merchant in, say, New York state there were
4 four -- all four network rules and state law, in essence five
5 walls standing between that merchant and the ability to engage
6 in surcharging.

7 THE COURT: Well, let me just ask you this: There
8 are no surcharging statutes in a number of states. Correct?

9 MR. FRIEDMAN: Correct.

10 THE COURT: We can start with California. Right?
11 Do they have a non-surcharging law?

12 MR. FRIEDMAN: They have a statute. It's been held
13 by courts there to actually compel only disclosure of the
14 surcharge but that's going to get sorted out because there is
15 an ongoing litigation challenging it directly.

16 THE COURT: And then there's Texas.

17 MR. FRIEDMAN: Yes.

18 THE COURT: They have one. And Florida has one.

19 MR. FRIEDMAN: Yes.

20 THE COURT: And several other states have them.

21 MR. FRIEDMAN: Correct.

22 THE COURT: So as of this moment, there are
23 impediments to permitting surcharging in those jurisdictions.
24 Correct?

25 MR. FRIEDMAN: That's correct. That's exactly

Mr. Friedman

1 right.

2 THE COURT: All right. And if approved, this
3 settlement will be of varying consequence to residents in
4 those states and others.

5 MR. FRIEDMAN: That is exactly right.

6 So for the majority of merchants, this is the last
7 wall, what's on the table right here today. For some
8 merchants in some states, it's the second to the last wall.

9 THE COURT: The last wall being statutory.

10 MR. FRIEDMAN: The last wall being statutory. And
11 without this network rule being removed, there can be no
12 statutory challenge. There's no incentive, nobody will do it.
13 This makes that meaningful. It puts every merchant one step
14 closer. For the vast majority, it gets them all the way home.
15 For a handful, they have another mountain to climb. And those
16 mountains are being climbed. As we've pointed out in our
17 papers, there are constitutional challenges afoot in Texas, in
18 Florida, in California.

19 THE COURT: But if you're a company with a national
20 operation, take Home Depot or CVS or Rite Aid, they could
21 impose surcharging certain places but not in other places if
22 this settlement is approved. Right?

23 MR. FRIEDMAN: For the time being, they could
24 surcharge only in some places but not in other places if the
25 settlement is approved. I will point out, however, that if

Mr. Friedman

1 the settlement weren't approved, then some of the objectors
2 here, the individual merchant plaintiffs in particular, are
3 keen on saying they want to hold out for differential
4 surcharging, the same is true there.

5 THE COURT: We'll get to differential surcharging in
6 a moment.

7 MR. FRIEDMAN: Okay.

8 THE COURT: Go ahead.

9 MR. FRIEDMAN: But, your Honor, you pretty much
10 brought me to the point of that, which is that for the
11 majority of US merchants this is it, this is the last obstacle
12 on a very long road.

13 So what I want to cover is, is I want to talk about
14 some of the elements of value that this settlement provides to
15 US merchants. I want to talk about why it is that we are so
16 sure that these tools are going to in fact be used in the
17 marketplace. And then I will address the class certification
18 issues. But I'm going to start by talking about what the
19 settlement does, what it is, and I think it's useful to have
20 that out on the table.

21 The core of the settlement agreement is that it
22 allows for surcharges. And the surcharging has to be done on
23 a parity basis, it can't exceed the surcharge amount on any
24 other credit card brand. It can't exceed the cost of
25 acceptance that the merchant has on American Express.

1 THE COURT: Why did you press for differential
2 surcharging? What's the reason for parity surcharging in this
3 case?

4 MR. FRIEDMAN: We certainly did press for
5 differential surcharging, and this reflects a compromise. And
6 what I want to explain here this morning is just how much
7 value there is in parity surcharging. Would differential
8 surcharging have been better? I think we've said throughout
9 our papers that it would have been.

10 I can't imagine a world where American Express
11 willingly agrees to allow its cards to be differentially
12 surcharged freely across the United States. I don't think
13 that that is a viable litigation outcome on any model. We've
14 looked very carefully at everything every objector has had to
15 say.

16 I don't want to be cute here, but I think we used
17 the term in one of our briefs, it's a litigation mirage, you
18 can't get there from here. We tried to get there from here.
19 We tried. We went through quite -- but -- now, I should dial
20 that back. There is -- if the -- we could still make a run at
21 differential surcharging. There is one way that you can get
22 through the court system differential surcharging for all
23 merchants in America. There's one way. I'll sketch it out
24 right now, though it had been at the back app with my
25 presentation.

Mr. Friedman

1 If the settlement is rejected then, then the next up
2 is the -- then there's the motion to dismiss our equitable
3 claims, the class equitable claims in favor of arbitration.

4 We have strong arguments based on the vindication of
5 rights doctrine from the Supreme Court. The Supreme Court
6 reaffirmed the vindication of rights doctrine, it did not
7 disavow it in Italian colors. And that's the portal that we
8 want to -- I think that's very clear, Justice Scalia made
9 statements reaffirming that there's a vindication of rights
10 doctrine. I think this is a situation in which it applies.

11 Obviously, the objectors here disagree with that.
12 Though nobody has spent any time in their submissions taking
13 on this vindication of rights issue. But the only thing that
14 is certain is that there will be appeals. However your Honor
15 rules, it's appealable. Well, yes, but it's appealable in
16 either direction and it is every bit the big heavy appellate
17 case the Italian colors was, and I think frankly more so.

18 And I think that the -- so it's a very difficult
19 road ahead. I think that there's a substantial likelihood of
20 certiorari being granted. Who knows where it leads. The
21 problem is if we go that road and we lose, then for 6 million
22 merchants there's no ability to surcharge, none. So it's very
23 risky. It would be a very risky gamble to just go into
24 that -- to embark on that appellate journey understanding that
25 if we're unsuccessful, that's it for 6 million merchants.

Mr. Friedman

1 Now, what's really important, what I really want to
2 convey to your Honor is just how much potential there is in
3 the parity surcharge and relief to give relief to merchants,
4 to do all the things that we set out to do when we brought the
5 case from Marcus Corporation over a decade ago and to incite
6 competition inside the credit card network. This is a
7 compromise. And I want to focus on the value of what it is
8 that we compromised for.

9 THE COURT: Do you have any indication on the ease
10 with which it will be possible to engage parity surcharging
11 for the restaurateur down the block here if this settlement is
12 approved? I mean, some of what I've read is to the effect
13 that it's difficult to explain, it's difficult to sell, and
14 it's difficult to do.

15 MR. FRIEDMAN: It is easier to explain the parity
16 surcharge. It's easier to do a parity surcharge than any
17 other form of surcharge. This is the simplest surcharge.
18 This is credit cards, 2 percent, debit free, we're done, as
19 opposed to some schedule of rates. So it's easier than
20 differential. But there's another aspect. I think --

21 THE COURT: But the parity surcharge would be by
22 type of merchant? It would be different for different classes
23 of merchants? For instance, airlines or retail drug chains or
24 major big box retailers, there would be different parity
25 surcharges for different classes of merchants?

Mr. Friedman

14

1 MR. FRIEDMAN: We cannot possibly know. And let me
2 put some flesh on the bones of that answer.

3 You'd think listening to the objectors, for example,
4 that parity surcharging cannot possibly take hold in the
5 places -- the places where it's most difficult to take hold,
6 where there's a real impediment, are places where credit and
7 debit are least substitutable. So that would be, say, high
8 ticket merchants or merchants that have other drabs on
9 substitutability between credit and debit, like hotels.

10 But here's what we know. In Australia all of the
11 hotels, virtually all of the hotels are parity surcharging.
12 That's a real life experiment, that's real world evidence, and
13 we see that there. And if you're going to adopt -- if you're
14 going to have the intuition or the theory that customer
15 defection risks doom parity surcharging, you have to account
16 for that real world evidence. Because if they're going to
17 doom it anywhere, it's in high ticket. But they don't.

18 The other -- I mean, the hotels -- the other point,
19 as long as we're on it, I'll stay on this point and Scott, can
20 we go to the hotel slide because I think it's illustrative,
21 another argument that we've heard from the objectors is, oh,
22 well, where you're not going to see parity surcharging is in
23 markets where it's competitive and the 7-Eleven objector's
24 expert Professor Hausman said well, we think Australia is less
25 competitive than the United States, and in competitive sectors

1 you're not going to see parity surcharging breaking out. But
2 there's not a lot more competitive sectors than this.

3 Within a stone's throw of the Sydney Opera House,
4 literally within a half a mile, every single one of these
5 brands, every brand you see coming on here is parity
6 surcharging. By the way, there are also a couple of other
7 hotels in the area that choose not to surcharge. That's fine.
8 The Intercontinental doesn't surcharge. Great. All of these
9 brands do. Clearly, this is a competitive market. Clearly it
10 is. It's just common sense.

11 Actually, if you can hit the next slide. Car
12 rentals at the Sydney airport, I mean, talk about a
13 competitive market, this is just as naked it as it gets. It's
14 right out there for the world to see. There's the cars,
15 there's the rates. And half of these brands are parity
16 surcharging.

17 And parity surcharging is nearly universal in huge
18 slots of commerce in Australia. So when the objectors proffer
19 the theory that customer defection risk will doom parity
20 surcharging, they have to account for the evidence. You can't
21 just ignore the evidence. And the evidence tells us that it
22 will take hold. It will take hold.

23 What do we have? We have merchants here saying, oh,
24 we're not going to do it. Well, that's what they said in
25 Australia. And every excuse that they've come up with for why

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1 what happened there wouldn't happen here falls like a rock.

2 The other one that the objectors have proffered is
3 that well, parity surcharging can really only happen where
4 there had been differential surcharging. So they would
5 explain away our evidence of widespread parity surcharging by
6 saying well, those folks had been doing differential. But if
7 you look at these hotels, not one of them -- all of them are
8 doing brand-wide parity surcharging. Not one of them began
9 their surcharging lives during differential surcharging. And
10 we know that from comprehensive AmEx data.

11 So the theory has to be able to survive the evidence
12 and it just doesn't. It doesn't. And my concern is that the
13 other side of the argument here is all based on just sort of
14 intuition, and our side is based on evidence.

15 There's one other suggestion that objectors have
16 made to try to explain the evidence of widespread parity
17 surcharging in Australia. I would be remiss if I didn't
18 mention it. And that is the notion that merchants do it
19 online, that, well, it's a niche practice, surcharging in
20 Australia, and people just do it online, a facet of their
21 business.

22 But if you just think about it for a moment, that
23 really doesn't hold water because if the risk you're concerned
24 about is customer defection, then I would submit the last
25 place that you would do parity surcharging is online because

Mr. Friedman

1 it's so easy for customers to defect. You can go from Amazon
2 to iTunes with a click of a mouse. Right? But if you wanted
3 to go from Home Depot to Lowe's, you have to get your bags,
4 get in your car, it's a much bigger deal. And there's no
5 evidence, there's just no evidence that surcharging is more
6 prevalent online. So all of that evidence just, I think, is
7 so strong in favor of our relief.

8 And I'd like to focus on the indicative aspects
9 because some of the criticism that we come in for in the
10 objection papers is that the relief here doesn't do anything
11 to foster competition inside the credit card space, you know,
12 that it's totally reliant on the dynamics of moving people to
13 debit and so forth.

14 And there's something getting lost here. We've
15 mentioned in a couple of our submissions now that the parity
16 surcharging relief that's provided for in this agreement and
17 the relief that will grow out of a Justice Department victory,
18 should they be victorious in the trial, if you take those two
19 strands of relief and put them together, that they open up
20 tremendous competitive opportunities where the whole is far
21 greater than some of the parts.

22 And there's an example that we gave. These briefs
23 are lengthy. But in our reply brief in the context of Macy's,
24 and what we said there was if Macy's doesn't want to surcharge
25 its own co-branded card, what it can do is it can impose a

Mr. Friedman

1 parity surcharge on all credit cards, say 2 percent, whatever,
2 and say, but if you use your Macy's card, the surcharge is on
3 us, we'll take it off the bill. And that would have the
4 effect of steering volume to the Macy's card, a good thing
5 from Macy's perspective. And it also gives people who want to
6 use a revolving credit a surcharge-free option, which is a
7 very large part of the critique of our relief, that we're not
8 affording a surcharge free revolving credit card option but
9 there you are in that example. I think you see that. And
10 that's kosher under the settlement agreement, this example.

11 And what I just wanted to spend a minute on here is
12 thinking about the opportunities to expand that basic concept,
13 because it goes far beyond code brands. You could have
14 Discover come to Hyatt or my client Marcus hotels and say, how
15 about this: Surcharge everybody at 2 percent and we'll
16 advertise that if they use their Discover card at the hotel
17 that the surcharge will never appear on their monthly
18 statement. The surcharge will never appear on the monthly
19 statement. It might be at the point of sale but they'll never
20 actually have to pay it. And it'll look something like this.
21 We put a slide up, this is a mockup, it's not -- you know,
22 this is not a real deal, we didn't do a commercial negotiation
23 here.

24 But it informs the consumer that Marcus imposes a
25 surcharge, tells them something about why and tells them if

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1 you use Discover card at Marcus hotels, the surcharge is on
2 us. And I think that there's a couple of powerful
3 implications here that weren't mention. One is that you're
4 giving the cardholder, you're giving the consumer a
5 surcharge-free option for using revolving credit cards if you
6 buy into the theory that to not do that would court customer
7 defection risk, and we don't buy that theory for the reasons
8 that I've talked about in Australia where just having pure
9 parity surcharging obviously is not costing anybody lost
10 sales. So I actually don't buy that theory. But if you do
11 buy that theory, here's a surcharge-free revolving credit card
12 option.

13 So in that sense, it ameliorates the customer
14 defection risk and it makes it easier to do parity
15 surcharging.

16 THE COURT: What is the benefit of this settlement
17 if you're wrong and merchants, large merchants in the United
18 States and small decide that they there's resistance to parity
19 surcharging, and you have this settlement which limits the
20 rights of merchants to adjudicate through various means their
21 complaints that arise out of their merchant agreements with
22 American Express and they don't get the surcharge because it,
23 as a practical matter, has resulted in consumer resistance?
24 So what's the benefit that has now accrued to the merchants
25 who are covered by this agreement?

Mr. Friedman

1 MR. FRIEDMAN: Okay, your hypothetical asks me to
2 assume that parity surcharging which is ubiquitous in
3 Australia is just is a nonstarter here.

4 THE COURT: I've never been to Australia. I don't
5 know how consumers think in Australia. If you'd like to send
6 me there, you know, so that I can conduct a survey, that would
7 be fine. But I'm talking about -- Australia is a -- it may be
8 a large country geographically but it's a small country in
9 terms -- and it's monolithic as opposed to the United States
10 which is more heterogenous. You know, the middle is different
11 from each of the ends, the south is different from the north.
12 There are all kinds of issues that play in the United States,
13 in terms of consumer loyalties and consumer preferences and
14 regional preferences and so forth that I can't even imagine.
15 We could write an encyclopedia on the subject.

16 I'm just asking you what if your theory is not
17 applicable or the Australian experience is not applicable to
18 the market here, the heterogenous market in the United States,
19 then what has been gained for the merchants as a consequence
20 of this settlement if it's approved.

21 MR. FRIEDMAN: First of all -- okay, I understand.
22 First of all, I think that the heterogeneity that you're
23 talking about supports the proposition that surely there will
24 be pockets of commerce in which this practice is profitable
25 for merchants. It's certainly profitable, it makes sense to

1 do it and -- but if it were -- like if you take -- if you're
2 saying -- if the hypothetical is that merchants won't do it,
3 like they can't do it, if there was a congressional, if there
4 was a federal law that says they can't do it.

5 THE COURT: Let me be more practical. Let's say I'm
6 buying a ticket from one point to another on an airline and I
7 see that Airline A has a 2 percent parity surcharge, but
8 Airline B, and that's a very competitive industry, has decided
9 that it's going to benefit from Airline A's decision and it's
10 not going to impose that surcharge and so I'm going to pay
11 2 percent less on Airline B on the same point-to-point trip
12 that I would have taken on Airline A.

13 MR. FRIEDMAN: If that hypothesis were -- if that
14 were correct, everybody would be Southwest, bags fly free, but
15 they're not. But they're not. And we know Southwest has the
16 bags fly free. You know a lot more about the airline industry
17 than I ever will, but that bag, if you checked two bags on
18 Delta or United or whatever, that's like, that as a percentage
19 of the ticket, I think somebody did 13 percent of the average
20 ticket or something like that but they don't move that much
21 more --

22 THE COURT: I'm asking if they decide to compete on
23 the surcharge, you know, it's -- obviously it's more complex
24 than the simple hypothetical that I gave you. But if they
25 decide to compete on the surcharge and there's pushback on

Mr. Friedman

1 Airline A, they can go back to not surcharging so that they're
2 not at a disadvantage on price. You know, when you go from --
3 as you said, if you click on Airline A and then you click on
4 Airline B and Airline B isn't charging the surcharge.

5 MR. FRIEDMAN: But what I'm trying to say, your
6 Honor, is that today you click on Airline A and you're paying
7 for bags, you click on Airline B and it's Southwest and you
8 don't pay for bags. And Southwest isn't eating everybody's
9 lunch. They're doing okay with the bags fly free but it
10 hadn't swept the industry. And that's the point we were
11 making, too.

12 I know you don't want to talk about Australia, but
13 why wouldn't Marriott hotels say, we'll surcharge free? On
14 that theory they would just, they would eat up the whole
15 industry, everybody would come flocking to them if that theory
16 were right. The problem is the theory is wrong. It is pure
17 theory. And this is evidence, we have evidence.

18 And further, when you apply it in the context like
19 on the slide that you see in front of you, it's a form of
20 surcharging that very much does lead to competition inside
21 credit cards. And any merchant can do it. And the restaurant
22 that you talked about in the earlier hypothetical, they should
23 be able to do a deal with their credit card companies to have
24 the surcharge come off.

25 You know, Professor Hemphill asked the objectors,

1 suggested that it would be useful if they could account for
2 the Australia evidence. And I think that was driven by his
3 understanding that if you're going to say well, Australia is
4 different, that's fine, but tell us, it's different because
5 what. It's different because one thing or another and they
6 don't have an answer. So I don't think we can just ignore it.

7 We also have other indications domestically. We do
8 see surcharging all the time, we see it in the form of
9 convenience fees. We see liveries and taxies surcharging. I
10 just flew into Newark airport this weekend, they charge \$5.50
11 more. If you take a taxi now into Manhattan, \$5.50 extra
12 charge if you pay by credit card. They jump through certain
13 hoops to make that legitimate under Visa's existing rules and
14 to not run afoul, to not sort of front run the settlement that
15 we have here. But it's going to take off. It's going to take
16 off.

17 The other side of the equation, though, to your
18 Honor's hypothetical is the value of what's being given up.
19 What's being given up by merchants here is the ability to
20 challenge these rules. This idea that they're sort of the
21 entire American Express rulebook is getting sort of cart
22 blanche forever in all of its applications is just not the
23 case.

24 THE COURT: Well, Professor Hemphill had some issues
25 with parity surcharges. And what's the difference between

1 parity and equal surcharging?

2 MR. FRIEDMAN: So his use of -- his phraseology was
3 new to me. And I think, and I can stand corrected here, I
4 think what he meant by that was that equal surcharging, that
5 term was where the merchant had the option of differentially
6 surcharging who was choosing to do it and was using parity
7 surcharging for the situation that would apply here, where the
8 merchants only -- I don't know. I don't know. But I have to
9 say I don't really understand, I didn't understand, I found
10 that confusing. I found most of his report clear as a bell, I
11 understood it, but I didn't get that.

12 THE COURT: Go ahead.

13 MR. FRIEDMAN: So the virtues that are associated
14 with differential surcharging engendering competition -- if
15 you look at this, going back to this slide, that's a very
16 valuable slot to be in where Discover is. That's saying steer
17 traffic our way. Right? Customers are going to flock to it.

18 Mr. Hochschild, Discover's president, came in here
19 during the trial and said Discover wants to have some way that
20 by reducing its overall costs to merchants that it can gain
21 volume. And the MDPs and the rules that existed from the
22 other networks, they precluded that.

23 THE COURT: Does the post settlement agreement
24 present a carve-out from the MDPs for the time of steering
25 that is involved in this discover ad?

1 MR. FRIEDMAN: No.

2 THE COURT: Because this is a form of steering.

3 MR. FRIEDMAN: This is. As I said, this is a
4 confluence of --

5 THE COURT: You can do this in Australia maybe.

6 MR. FRIEDMAN: This is a confluence of the DOJ
7 relief, if they are victorious.

8 THE COURT: So now I have to figure out what's going
9 on in that case? I don't even have their paperwork yet.

10 MR. FRIEDMAN: I know. The trucks will be arriving
11 tomorrow with the boxes.

12 THE COURT: They have to come in through the loading
13 dock.

14 MR. FRIEDMAN: But this model, this slide that's up
15 here does presuppose absolutely this is a form of steering
16 that would require the MDP relief. However -- Scott hit the
17 next slide -- this one does not. This is Discover,
18 unilaterally without merchant involvement could come out with
19 a card. We came up with the It's On Us card from Discover,
20 all your credit card surcharges are on us. You use this card,
21 we'll absorb the surcharge. It's a terrific competitive
22 position. It makes surcharging easier for merchants, if there
23 is something like this out there in the marketplace.

24 THE COURT: You know, I see a revision in the
25 merchant agreement for American Express with merchants if

Mr. Friedman

1 that's the consequence, that this -- I can imagine when there
2 are renewals, based on my seven weeks of experience with the
3 bench trial, that, that American Express -- and I'm not their
4 lawyer, obviously -- that American Express might find
5 something like this to be in effect a form of steering on the
6 part of not Discover, which they can do, but on the part of a
7 merchant which accepts both Discover and American Express.

8 MR. FRIEDMAN: Well, I'm glad you said that, your
9 Honor. What that reflects is an appreciation of the potency
10 of this tool and they would react to it, that they would want
11 to react to it by shutting it down. And I don't disagree that
12 they might. But they can't. But they can't.

13 This is unilateral action by Discover that is
14 doing -- it's nothing different than Discover -- Discover can
15 do its cash back, but they're saying wherever there's a
16 surcharge, if you use this Discover On Us card, we'll eat the
17 surcharge and we'll give you a rebate.

18 And what our settlement agreement says is that the
19 amount of the surcharge across all brands has to be the same,
20 it has to be parity, after accounting for all discounts and
21 rebates that are offered at the point of sale. And this
22 rebate is happening not at the point of sale, Discover's
23 advertising it, Discover's delivering the rebate on the
24 monthly statement.

25 And I'm pretty confident that American Express isn't

1 going to disagree. This doesn't violate anything and there's
2 nothing that American Express can do to make it violate
3 anything. And the consequence is that what you're going to
4 have is competition, it's competition inside the credit card
5 industry, it's steering, it's effective steering. And of
6 course, the possibilities are even broader if the DOJ
7 prevails.

8 THE COURT: So this could result in going back to
9 other, Visa and MasterCard could embrace the same idea.

10 MR. FRIEDMAN: Yes. Yes, let the bidding again.
11 Yes, we'll pay half your surcharge, we'll pay three quarters,
12 we'll pay the whole thing. We'll pay the surcharge,
13 whatever -- let's say Discover is sitting around saying, you
14 know what, we don't have deep enough penetration in airlines.
15 AmEx is eating our lunch on airlines. They own the airline
16 space, them and MasterCard. Let's do a card that says
17 whenever you incur a surcharge on an airline, it's on us. The
18 possibilities are endless, it's competition. It's
19 competition. We should be welcoming it. And it makes it
20 easier.

21 So if the supposition that the objectors have
22 proffered, and Professor Hemphill was sympathetic to this
23 concept, that it's very hard to get surcharging going if
24 you're not offering a surcharge-free option to revolving
25 credit card preferring people, this does that. This does

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1 that. That's what I really wanted to convey.

2 I'm going to wind down now --

3 THE COURT: Well, do you have more to say.

4 MR. FRIEDMAN: I do.

5 THE COURT: Well, let me hear some more.

6 MR. FRIEDMAN: Okay. On other issues, though, this
7 is the -- the other -- okay, so here's what I want to talk
8 about that rises to the level. If you're going to look at the
9 settlement, under the law what we have to do is take the value
10 of the settlement and compare it to the alternative. It's a
11 comparative analysis. We have to look at the alternative. So
12 let's take a moment and look at what happens if the settlement
13 is rejected. So step one is we go into that giant appellate
14 popcorn machine again.

15 THE COURT: You're going there? Everyone's going --
16 I assume --

17 MR. FRIEDMAN: Well, with that one, I'm not troubled
18 by that one. I mean, I don't mean to be hubristic. If we're
19 going up on a settlement, it would be one thing. What I'm
20 talking about is on the motion to dismiss in favor of
21 arbitration, Italian Colors redux, that's a load, just
22 speaking from personal experience. And --

23 THE COURT: I think they'd love to see you up in the
24 Second Circuit and the Supreme Court. Italian Colors, the
25 name, it has appeal written all over it.

Mr. Friedman

1 MR. FRIEDMAN: And I want to get my batting average
2 in the Supreme Court up to 500. But --

3 THE COURT: We all have dreams. But go ahead.

4 MR. FRIEDMAN: So that's one road and I had spoken a
5 little bit about that earlier, that's the class road. Let's
6 talk about for any given merchant plaintiff. If the
7 settlement is rejected, they can go seek differential
8 surcharge or whatever. And most of the objectors haven't told
9 us what they're interested in, but they can go under the
10 dispute resolution provisions in their contract, and for most
11 folks that's going to be arbitration.

12 So first they have the merits risk, they have to
13 convince the arbitrator that they're going to win on the
14 merits. And American Express is going to say, and your Honor
15 has had some taste of this here in the trial, they're going to
16 say if you allow this steering practice on an unfettered basis
17 of American Express cards, then that's going to really cripple
18 our ability to provide this differentiated service which is
19 pro competitive value.

20 That defense is going to be more powerful in the
21 differential surcharge case I submit than it has been here.
22 But then say that the claimant gets past that level, now
23 they're at the remedy stage. Now they're telling an
24 arbitrator, let's say it's Home Depot, that they need to have
25 unfettered differential surcharge of American Express cards,

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1 the ability to do that across all Home Depot stores. And just
2 like in this trial, you had Mr. Chenault come in here and
3 others and tell you about what much less potent forms of
4 steering would do to their brand. This arbitrator is going to
5 be told that if he rules that way, it's going to cost
6 thousands of jobs, I don't know, billions in market
7 capitalization, whatever their argument is going to be. I'm
8 just saying it's no walk in the park. It's a very heavy lift.

9 Let's assume they get through all that and then they
10 have an arbitrator who is actually prepared to do that. Then
11 what happens? Realistically on Planet Earth that case
12 settles, that's what happens. The merchant had some leverage,
13 they use it, they use it to settle the case for more than they
14 think that they could have gotten from the damages suit alone.
15 It's a confidential settlement and that's it. There's no
16 positive spillover effects. There's nothing to benefit any of
17 the other 6 million merchants. We have 6 million merchants in
18 this class, none of them benefit a lick from that private
19 confidential settlement.

20 So those are the two things that we're weighing
21 here, the tremendous competition unlocking value of the
22 surcharging relief in the settlement agreement, which is
23 supported by evidence. And I understand the intuitions. I'm
24 not saying the intuitions in themselves, they're crazy to
25 have, I get them. But if they don't withstand the evidence,

Mr. Korologous

1 then they shouldn't guide the ruling. That's my fundamental
2 position.

3 I'm already leaving Mr. Korologous less time. If
4 it's okay with you --

5 THE COURT: I'm going to give him his 20 minutes.

6 MR. FRIEDMAN: Okay.

7 THE COURT: Because I've asked you a lot of
8 questions and so if you have something more to say, please say
9 it.

10 MR. FRIEDMAN: I'm happy to say there are legal
11 objections that are raised and I think that it's kind of
12 natural to raise those then on the rebuttal case. So, for
13 example, the due process objection, Rules Enabling Act
14 objection, prepared to speak about all those, it's kind of a
15 reply briefing for me to get into it here.

16 THE COURT: Okay, why don't you wait until the end.

17 MR. FRIEDMAN: Then the only other issue is the
18 attorneys' fee application. If you're just as happy with us
19 putting that to the end, because we've said everything in the
20 papers, there's no surprises.

21 THE COURT: All right. Thank you very much.

22 MR. FRIEDMAN: Thank you, your Honor.

23 THE COURT: Okay. Mr. Korologous.

24 MR. KOROLOGOUS: Good morning, your Honor.

25 THE COURT: Good morning.

1 MR. KOROLOGOUS: Philip Korologous for American
2 Express.

3 As the court knows, after a lengthy investigation
4 the Department of Justice in 15 plaintiff states chose not to
5 challenge American Express's prohibitions against
6 discriminatory surcharges. We obviously believe that was both
7 a pro consumer choice and the right choice by the Department
8 of Justice. But the class in 15 individual merchants did
9 challenge our parity surcharging requirements. It required
10 parity even with debit cards. AmEx has heard the concerns of
11 its merchants but it also must protect its differentiated
12 services model. It's careful evaluation of the situation has
13 led it to believe that there is a way to give merchants a
14 surcharging option that would not eliminate our ability to
15 provide valuable differentiated services to consumers and to
16 merchants.

17 This is a major concession for American Express,
18 especially given the weaknesses of the merchants cases,
19 especially given the weaknesses of their cases on surcharging,
20 including the weakness in the class's case in light of the
21 Italian Colors decision on arbitration provisions.

22 As the court knows, the company was and remains
23 determined to fight to preserve the rest of its
24 nondiscrimination provisions as critical to the companies
25 survived. We believe that our compromise on surcharging as

1 well as our compromise on the contractual rights to enforce
2 individual arbitration provisions are a significant value to
3 merchants.

4 On the other hand, and as I'll discuss further,
5 we've made clear that this is as far as we can go to achieve a
6 compromise that would apply classwide.

7 This settlement is both procedurally fair and
8 substantively fair therefore meeting the standards for
9 approval. As the Second Circuit said in the Wal-Mart case,
10 there could not be any better evidence of procedural integrity
11 than a history of aggressive litigation and impassioned
12 settlement negotiations before a mediator. That's what
13 happened here. The class wanted more relief, we wanted less.
14 The class felt it had the right to proceed as a class on
15 injunctive relief claims. We disagreed. Luckily, we had the
16 good services of Ken Feinberg, without whom I don't think we
17 would be here today because he kept bringing us back to the
18 table. As he noted in his affidavit, it would be a real
19 understatement to say that the negotiations were arm's length
20 and hard-fought.

21 Some objectors have claimed that because of the
22 Italian Colors case the class was fatally wounded and that
23 class counsel entered into the agreement with American Express
24 to get paid their \$75 million in attorneys' fees. But as the
25 Second Circuit noted in the McReynolds, primarily because

1 class counsel left the issue of attorneys' fees to the
2 discretion of the district court, there was no indication that
3 the settlement was the product of bad faith or collusion. The
4 same is true here.

5 We have not agreed to pay \$75 million, we've agreed
6 to pay whatever your Honor orders. And if that amount is much
7 less, the class is obligated to continue with the settlement
8 even if they do not get what they're asking for in their
9 attorneys' fees. The settlement is substantively fair. In
10 applying the Grinnell factors, the Second Circuit has noted
11 that there is a range of reasonableness with respect to a
12 settlement but recognizes the uncertainties of law and fact in
13 any particular case.

14 The settlement responds to merchants' requests for
15 some changes to the MDPs by allowing merchants to surcharge
16 credit and charge transactions while not surcharging debit
17 transactions. While AmEx continues to believe that
18 surcharging is bad for consumers, we responded to the call for
19 some changes to our MDPs with the most reasonably able in our
20 belief to provide while maintaining our ability to provide our
21 differentiated services.

22 The settlement also resolves what Judge Gleeson
23 referred to as the American Express problem in his approval of
24 the settlement in 1720. There your Honor will recall many of
25 the same objectors that are here complained that because of

1 the juxtaposition of Visa and MasterCard's prohibitions on any
2 surcharge and debit cards a prohibition that continues today
3 even after the 1720 settlement combined with American
4 Express's requirement that if there is a surcharge on American
5 Express cards it needs to be the same across all cards,
6 credit, charge and debit cards. Those objectors complained in
7 1720 that that meant with American Express's rules and the no
8 surcharging obligations for debit from Visa and MasterCard,
9 they could not get to any of the benefits under 1720.

10 This settlement unlocks that. This answers that.
11 It may not be a complete answer for all of the issues that
12 merchants have raised about surcharging. It doesn't resolve
13 state laws. It doesn't resolve the complexities of the
14 competitive environment. It doesn't resolve the technology
15 issues. But as Judge Gleeson noted, this is one issue. This
16 is across the board benefit for all merchants whether they
17 choose to engage in it or not, whether they have the ability
18 to engage in it or not. It is benefit for all merchants and
19 therefore since it applies to everybody satisfies Rule 23 and
20 the due process standards under the Dukes case. It is a
21 benefit for the class that is approvable. It is but one piece
22 of the mosaic, as he called it, to solve the many issues that
23 merchants are complaining about. But it is one piece in
24 benefit for merchants.

25 THE COURT: Well, let me ask you this, and perhaps

Mr. Korologous

1 you can address the issue in terms of class certification
2 under Rule 23, having to do with a necessity, I think with
3 (b) (2) class, to have commonality and typicality. And I spent
4 almost seven weeks listening to testimony, you were there for
5 most of it --

6 MR. KOROLOGOUS: I was, your Honor.

7 THE COURT: -- about the customized MDPs that you
8 have with certain merchants at American Express.

9 And my question is: Is there really sufficient
10 commonality and typicality for class certification where you
11 have many of the largest merchants in America who have
12 national chains of stores where they have special terms in
13 their MDP arrangements with American Express as opposed to the
14 vast majority of small merchants who were simply handed the
15 merchant agreement and told this is it, take it or leave it?

16 MR. KOROLOGOUS: Your Honor, there is typicality and
17 commonality. The claims are related to aspects of the
18 nondiscrimination rules that do apply across the board. Take
19 surcharging and differential surcharging for instance. There
20 are no agreements, negotiated or formal agreements, in which
21 American Express allows American Express cards to be
22 differentially surcharged against. There are none. We have
23 been consistent with that issue across the board.

24 And the classes claims that that violates the
25 antitrust laws. It is a claim that applies equally for all

1 merchants and therefore satisfies the commonality and
2 typicality both for the class certification under 23(b)(2) and
3 also the due process analysis that the Supreme Court has done
4 in Dukes and other cases to satisfy that standard.

5 With respect to some of the differences, take Home
6 Depot that operates in the ten or so states that have rules
7 that affect its ability to surcharge. That's going to be true
8 even if this case is not approved for settlement and even if,
9 somehow, despite all of the hurdles to show relevant market
10 that debit is not in the market so they can have a market
11 where they argue that there is some level of market power the
12 pro competitive effects of our steering -- of our non-steering
13 rules generally but also of the no differential surcharging
14 agreements, if they can achieve all of the hurdles they have
15 to get through to win the case they still face ten states that
16 have these no surcharging rules.

17 They still have competitors that might chose or even
18 announce that despite what has happened in the settlement or
19 despite what has happened in the victory in court, they're
20 going to not surcharge, they are still going to have
21 technology issues that need to be solved. That's part of the
22 mosaic, as Judge Gleeson put it, that exists in the entire
23 issue of the payments industry. This is but one piece of that
24 mosaic. This is the piece that the class and the merchants
25 believe benefits them.

1 Let's look at the issue, for instance, of whether
2 debit is in the market more than there will be a benefit to
3 substitutability between credit and debit. Look at the
4 individual merchant's damages case. In their case, it is
5 premised on the ability of stores to get consumers to shift
6 from credit and charge cards to debit cards. Their entire
7 supposed overcharge theory which we believe has a lot of flaws
8 but it is premised on calculation that builds off of a PIN
9 debit rate and says there are a few other things like the
10 uniqueness of American Express and fraud that we're going to
11 add to that rate, but it is driven by substitution from credit
12 and charge cards to debit if steering and surcharging is
13 allowed. That's the very kind of substitution that we believe
14 in our case and that we've discussed with your Honor ought to
15 be showing that debit is in the market. But it also goes to
16 the issue of whether there is value, in their view, in their
17 submissions in this court as to whether there's value to this
18 settlement.

19 And again, it's a piece of the mosaic. It is a
20 benefit to them, they believe, to be able to do this. It's
21 not going to solve all of their issues, nor can it. This
22 court doesn't have the ability to eliminate ten different
23 states' laws. It doesn't have the ability to solve the
24 technology problem. It doesn't have the ability, nor should
25 it, even contemplate saying that merchants should not compete

Mr. Korologous

1 with one another about whether they're going to surcharge
2 their consumers or not.

3 THE COURT: I walked in here, I thought I was
4 powerfied. Now I know I'm just here for the ride.
5 Mr. Korologous, I appreciate you delineating all the ways I
6 can't do things.

7 MR. KOROLOGOUS: It's not to say it's limiting on
8 your Honor's powers, but it's simply a recognition of the
9 various issues that merchants complain about, including in
10 their objections here that do not go to the issue of whether
11 this settlement is approvable, but whether they could get
12 more.

13 Many of the objectors argue that essentially from
14 the base, including with respect to their arbitration clauses,
15 that they want to do it on their own. They want to opt out,
16 they have the ability to do better than this. But Rule
17 23(b)(2) exists. It exists to create non-opt-out claims.
18 This case has not raised concerns such as the objectors raise
19 under Dukes of settling a case that involves both injunctive
20 relief and damages. Damages are preserved. Any pre rules
21 change conduct by American Express for which we're found
22 liable for are damages that every member of the class will
23 continue to preserve.

24 THE COURT: Well, I understand the theory behind the
25 Supreme Court's decision in Dukes. I think we have a very

Mr. Korologous

1 different situation here, quite frankly. I'm concerned about,
2 what the tradeoff that was negotiated through Mr. Feinberg,
3 which is on the one hand the merchants, if they won, get their
4 parity surcharge; on the other hand, American Express gets the
5 tradeoff of limiting for all intents and purposes, any future
6 challenges to the MDPs. Isn't that basically right?

7 MR. KOROLOGOUS: Yes, but there's a footnote.

8 THE COURT: Including merchants who aren't even
9 currently accepting the American Express card. In other
10 words, future draft picks.

11 MR. KOROLOGOUS: Correct.

12 THE COURT: So I go into business tomorrow selling
13 flowers, which a lot of Greek people do. All right. And I
14 take the American Express card because I'm up on, I'm up on
15 Madison Avenue and 85th Street where people pay a lot for
16 flowers, but I can't challenge, I'm limited as to what I can
17 do in terms of challenging the MDP.

18 MR. KOROLOGOUS: In that instance that's correct,
19 your Honor. And as part of the relief that American Express
20 is willing to enter into providing for the first time this
21 kind of surcharging that does not require parity with debit
22 surcharging, American Express requires uniformity across the
23 class for that relief. That means not just the existing
24 merchants today but should a new merchant come along. There
25 are a number of cases we cite in our brief where future

1 members of the class are bound, one of the Giuliani cases, one
2 of those cases, but there's certainly is the power in
3 approving the Rule 23(b)(2) settlement to settle claims
4 including for future class members.

5 THE COURT: And that could affect many thousands of
6 merchants over a ten-year period.

7 MR. KOROLOGOUS: It certainly could but they would
8 be getting the same benefits as the class of merchants that
9 exist today get. They would get the same benefit of
10 proceeding under the revised rules with the right to surcharge
11 credit and charge cards at one even level among that group
12 while not surcharging debit cards.

13 THE COURT: Aside from the Visa/MasterCard
14 settlement, has there ever been a settlement that had the kind
15 of reach in terms of the numbers of entities that were
16 affected, commercial entities that were affected as this
17 settlement would apply to, to your knowledge?

18 MR. KOROLOGOUS: I'm sure there have been. They
19 don't spring to my mind. Perhaps discussions with my group
20 and when I stand back up this afternoon, I'll bring to light
21 some of the broad instances.

22 THE COURT: I'd be curious.

23 MR. KOROLOGOUS: But the issue, again, in those
24 cases, as well as in this case, is whether there is uniformity
25 of the claims that are brought and the relief that's being

1 granted in the settlement. And that's the analysis under the
2 due process consideration under Dukes and under the language
3 of Rule 23(b)(2), including as identified in the advisory
4 notes of that decision.

5 THE COURT: Well, I mean, the objectors constitute a
6 wide range of major commercial entities and in this country
7 and so I have a concern that if so many entities which have
8 such a considerable role in the marketplace in America object
9 on various grounds to the settlement that it may be that while
10 the smaller merchants, restaurants, the florist and others
11 don't find it to be objectionable, at least according to what
12 we have in the record here, but many of the larger merchants
13 find it to be objectionable that there's something more to it
14 than meets the eye from my standpoint and I'd be concerned
15 about that.

16 MR. KOROLOGOUS: Well, you're right, your Honor,
17 there are two ways to look at it in terms of the absolute
18 number of merchants. There were millions of notices sent out.
19 There are, depending upon how you count it, maybe 4 million
20 top of chain merchants, 6 million if you count locations.
21 There are objectors here. Again, there's a different way to
22 look at them. There are either about 350 or if you group the
23 Blue Cross entities together, there are about 175, I believe,
24 a tiny fraction of all of the merchants.

25 The other way to look at it is on a charge volume

1 basis where the percentage is much higher because the number
2 of merchants that are here are large merchants in a variety of
3 industries. But, again, it comes down to application of the
4 rule and whether the standards are satisfied of whether the
5 injunctive relief is relief that will apply to all merchants,
6 not whether they will all then choose to do something under
7 that. They will have the right to chose that. They will now
8 have the option that they did not have before.

9 And as Judge Gleeson said and as other cases have
10 recognized, that kind of an option is an advancement for them
11 that is sufficient when you go through and satisfy the
12 Grinnell factors, which as our papers say, and as the classes
13 papers say are satisfied here, that is sufficient under Rule
14 23(b)(2), and under the due process considerations to approve
15 this settlement. Thank you, your Honor.

16 THE COURT: Okay. Thank you. All right. Now, I
17 just wanted to point out that I'm allowing 90 minutes for the
18 proponents rebuttal and some of these issues might be further
19 flushed out during the rebuttal, so let's move on now. What
20 I'd like to do is I've allocated 35 minutes for the Target
21 objectors group and National Retail Federation. And according
22 to my notes, the spokesperson will be Mr. Cantor.

23 MR. CANTER: Yes, your Honor.

24 THE COURT: Just state your appearance for the
25 record, if you will.

Mr. Canter

1 MR. CANTER: Your Honor, my name is Michael Canter
2 and I represent the group of Target objectors and the National
3 Retail Federation. And if I may, your Honor, we have a couple
4 of demonstratives and we've printed them out as well put them
5 electronically. And if I could pass those up to your Honor at
6 this point.

7 THE COURT: Sure, give them to my clerk.

8 MR. CANTER: Thank you.

9 MR. FRIEDMAN: Your Honor, may I control the screen?

10 THE COURT: Yes. There you go.

11 MR. CANTER: Your Honor, we represent the 18 Target
12 objectors and the National Retail Federation. And as your
13 Honor has already noted, they represent some of the largest
14 national retailers in the country. The National Retail
15 Federation is the leading retail industry trade association.
16 We are coordinating our arguments this morning for time, et
17 cetera, with the 7-Eleven objectors, the individual plaintiffs
18 and with Home Depot.

19 My argument is going to focus on the implications of
20 Italian Colors as well as why this settlement does not pass
21 muster under Rule 23(a) and 23(b)(2).

22 The first reason that the settlement must be
23 rejected is it violates the Supreme Court's decision in
24 Italian Colors. As your Honor knows, Italian Colors holds
25 that a contract right to have a claim resolved through

1 arbitration is a substantive right and it's protected by the
2 Federal Arbitration Act and the Rules Enabling Act and Rule 23
3 cannot be used to abridge that right. This settlement would
4 do just the opposite. It would use Rule 23 to strip our
5 clients of their contractual arbitration rights.

6 The proponents point to certification of the
7 mandatory class in 1720 and say that this class should be
8 certified as well. This case is not like 1720. As your Honor
9 probably knows, Visa and MasterCard contracts, merchant
10 contracts do not have arbitration clauses. Italian Colors was
11 not an issue in Judge Gleeson's courtroom, it is an issue in
12 this courtroom.

13 Soon after Italian Colors was decided, AmEx moved to
14 dismiss or to compel arbitration in this case. It's motion
15 accurately summarized the holding in Italian Colors. And this
16 is what it said: Here the Supreme Court has already ruled
17 that the American Express arbitration clause, including
18 specifically the class action waiver, must be enforced. But
19 the merchants have the same arbitration rights that AmEx has.
20 And why is that? That is because AmEx contracts are mutual.

21 Let me bring to your Honor's attention, and we've
22 submitted this with the objection of limited brands, that the
23 clause in the limited brands contract, any claim that has not
24 been resolved pursuant to Section A or B -- A is the meet and
25 good faith provision and B is the mediation provision -- any

1 dispute that's is not resolved through A or B shall be
2 resolved, and we've emphasized this, upon the election by you
3 or us. So both parties can take the other to arbitration.

4 Neither AmEx nor class plaintiffs dispute that this
5 settlement, if approved, would eliminate that arbitration
6 right. The Target objectors assert that the settlement must
7 be rejected because it would use Rule 23 to strip merchants of
8 their arbitration rights and that violates Italian Colors and
9 the Rules Enabling Act. The class plaintiffs argue that they
10 have the authority as class representatives to weigh the
11 arbitration rights of absent class members.

12 Our clients never authorized class plaintiffs to
13 waive their arbitration rights. Instead, our clients have
14 actually invoked their arbitration rights and their letters to
15 American Express have been attached to their objections.

16 The class plaintiffs as Rule 23 representatives have
17 no independent authority to waive the arbitration rights of
18 absent class members. This is because Rule 23 does not
19 grant them that power under Italian Colors. In addition, the
20 class plaintiffs are not even valid class representatives.
21 They waived their arbitration rights years ago. The class
22 plaintiffs are not adequate because they do not have the same
23 substantive arbitration rights as the absent class members.

24 These same facts create an irreconcilable conflict.
25 The class plaintiffs never wanted to arbitrate their claims

1 against American Express, they wanted to litigate. As you've
2 heard, they fought for years for the right to litigate but
3 lost in the Supreme Court. Having lost, the class plaintiffs
4 now want to bargain away the arbitration rights of the absent
5 class members.

6 This is not a circumstance where the class
7 plaintiffs and the absent class members share the same claims
8 but disagree over the terms of settlement. This is a case
9 where the parties do not have the same claims and that's an
10 irreconcilable conflict and for that reason settlement must be
11 rejected.

12 Let me turn now to 23(a)(2) and 23(a)(3). As we've
13 said, most of the absent class members all have contractual
14 rights entitling them to unique ADR processes, alternative
15 dispute resolution processes, and to individual resolutions of
16 those disputes with AmEx. The class representatives have
17 waived their rights and therefore under Rule 23(a) they do not
18 share the claims of the class and therefore the settlement
19 fails 23(a).

20 The settlement class also fails (a)(2). This is
21 because the court cannot look at the AmEx merchant agreements
22 that the class plaintiffs have and determine from them what
23 the ADR rights of all of the class members are. It was
24 established at the government trial, as your Honor knows, that
25 AmEx negotiates different contracts with different merchants.

1 And we looked at some of the transcript, and this slide just
2 summarizes some of the testimony that you heard that
3 indicates, as already mentioned here this morning, that AmEx
4 negotiates with individual merchants.

5 That testimony did not focus on the ADR clauses, it
6 focused on the nondiscrimination clauses. And that's because
7 ADR was not an issue in the government trial. But the
8 interest Target objectors and the National Retail Federation
9 have submitted evidence that the ADR rights vary from merchant
10 to merchant entitling different merchants to resolve their
11 claims in different ways.

12 And this particular chart, this is a compilation of
13 all of the evidence that we submitted for our clients on the
14 objection. And of course down the right-hand side are the
15 merchants that we represent and they are ordered in terms of
16 size of sales. So Target is the largest. National Retail
17 Federation is actually the smallest. American Signature would
18 be the smallest actual merchant. And across the top are the
19 different options for how -- the different -- I call it the
20 different paths that a dispute resolution process could take.
21 They all start, virtually all, the same way and that is you
22 give notice, and we've done that. But the second column is an
23 interesting provision. It says that, when you start a dispute
24 resolution with AmEx, you have to meet in good faith and try
25 to resolve that. And I contend there is not a court in this

1 country that wouldn't enforce an obligation to meet in good
2 faith that AmEx has put into its provisions.

3 Then you get to mediation and there are different
4 options on mediation. Some of the merchants have mandatory
5 mediation. Others have mediation by election, meaning, one
6 party can require the other party to come to mediation.

7 And then in the last of the three columns is
8 mediation by agreement where both parties have to agree. Fail
9 to resolve, you go on to arbitration. And it follows the same
10 pattern as mediation. There's mandatory arbitration, elective
11 arbitration, where one party can compel the other to
12 arbitration, and then arbitration only by agreement. The
13 colors indicate which merchants have the same path. So Target
14 has a unique path. No other merchant in our small sample, our
15 client group, has a contract like Target's.

16 Macy's has its own path. Even though it's the
17 secretary largest, it has a path that's different than
18 Target's. TJX, which is T.J. Maxx, and a couple of other
19 stores brands like that, has its own path and Staples has its
20 own path and Limited Brands has its own path.

21 Then you get into a group of companies, and again
22 coming down in size of company, where the next three companies
23 Bon-Ton's, Office Depot, and OfficeMax, all have the same path
24 in their contracts. And these are all negotiated. And Macy's
25 and Target specifically negotiated these provisions to meet

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1 the kind of dispute resolution that they wanted, as the TJX
2 Staples and Limited Brands, L Brands. Ascena and Saks and
3 Chico's have their own path in their contracts. And the
4 National Retail Federation has it's own path.

5 And at the bottom we have the Morales declaration
6 that was filed in support of the motion to compel arbitration
7 by AmEx, and that's for the smaller merchants. And what
8 you'll note is that the smaller merchant path is actually
9 different than all of the larger merchants. Just to give your
10 Honor a sense of what we're talking about, because I know
11 you've heard a lot of testimony that we have not been privy to
12 as objectors, but our largest client Target, for example, has
13 \$75 billion in retail sales annually. Macy's has 25 billion.
14 American Signature has 1 billion. All much larger than the
15 class representatives here who I believe the Morales
16 declaration was intended to represent what their arbitration
17 rights looked like in their agreement. So millions of
18 merchants who have different arbitration agreements, different
19 ADR paths than the larger merchants.

20 Now, this isn't all of AmEx's millions of merchants,
21 these are the only contracts that we have privy to. And we
22 thought once we looked at them and we saw them, what we
23 realized is that because there has to be commonality in an
24 (a)(3) class action, (a)(3) requirement, that the court has to
25 be able to look at the representative's contract and answer

1 the question what are the ADR rights of the class. It's
2 pretty obvious from just this sample that that can't be done
3 and for that reason (a)(3) isn't satisfied.

4 THE COURT: Could you just explain something on this
5 chart? The difference between arbitration at election of
6 either party and arbitration by agreement, how did the -- I
7 understand the election. But what's arbitration by agreement?
8 Does it require both sides to agree to the arbitration?

9 MR. CANTER: It does, your Honor. That's exactly
10 what it means.

11 THE COURT: And so Target has a merchant agreement
12 with American Express where it could reject arbitration and go
13 to litigation. Is that right?

14 MR. CANTER: It could.

15 THE COURT: As with the case with Macy's and T.J.
16 Maxx?

17 MR. CANTER: That's correct. We believe that what
18 the Supreme Court is saying in Italian Colors is it is not
19 limited, the holding is not limited to simply arbitration.
20 What the court is saying is that when you make an agreement,
21 like any of these agreements, that provide for how your
22 dispute is going to be resolved, that that is an enforceable
23 substantive right because it's negotiated in a contract and
24 the Rules Enabling Act protect that substantive right. That
25 also happens to coincide with the Federal Arbitration Act

1 which provides special protection for arbitration. So we
2 believe that Italian Colors reaches all of the variations that
3 are represented by our clients.

4 THE COURT: So is it your view that if this class
5 settlement agreement is approved, that it will somehow affect
6 Target's right to reject arbitration and go to litigation?

7 MR. CANTER: It will affect Target's rights to have
8 good faith negotiations with AmEx over issues such as
9 surcharging. If Target desires to have a conversation with
10 AmEx about surcharging as part of its larger contract
11 negotiations, we want to surcharge, we want the right to
12 parity surcharge, we don't really care about surcharging, we
13 want something different than that.

14 Target, which American Express absolutely wants to
15 be in, has the leverage to have those conversations and they
16 agreed when they enter this contracted that if they have a
17 dispute they're going to sit down with each other in good
18 faith and try to resolve that. This settlement strips that
19 away.

20 THE COURT: I'm trying to understand why that is if
21 at the end of the day after mandatory mediation Target can
22 turn around and say, we decided -- we're the, you know,
23 800-pound bully in this relationship and we're just going to
24 go to litigation and we're not going to go to arbitration.

25 MR. CANTER: They could do that but for the

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1 settlement. This settlement strips their right to go to
2 litigation because of the release that is imposed upon Target.

3 THE COURT: All right. So you're saying that this
4 settlement, proposed settlement, effectively modifies the
5 merchant agreement between Target and American Express in that
6 regard?

7 MR. CANTER: It absolutely does. They negotiated
8 their relationship, including how they would resolve disputes
9 with each other. This settlement comes in in the middle of
10 that and changes it.

11 THE COURT: Go ahead.

12 MR. CANTER: The next two columns are interesting
13 and I'm going to get to the last column in a moment, but the
14 second-to-last column is the provision that was sustained in
15 Italian Colors which says you can't participate in the class.
16 These are the merchants that have that provision in our group.

17 And the last column indicates the merchants where
18 their contracts reserve to them the right to accept the relief
19 or reject the relief and not to participate at all in the
20 settlement. And I'll get to that in a just a moment.

21 I just want to bring to your Honor's attention why
22 this kind of evidence was not brought to your Honor's
23 attention as part of the motion for settlement approval. And
24 there's a footnote in the material that the class has
25 submitted which is very telling and that is that they did not

1 take discovery of the kind of information that we've just put
2 in front of your Honor. So they had no way of knowing what
3 the real facts were that either support or required denial of
4 the (a)(2) and (a)(3) issue.

5 So because the alternative dispute resolution rights
6 of all the punitive class members cannot be determined in one
7 stroke, to quote from Dukes, the settlement class must be
8 rejected. The third reason settlement must be rejected is
9 that it fails to meet the stringent procedural requirements
10 required by the Supreme Court's decisions in Amchem, Ortiz and
11 Dukes for certification of a mandatory (b)(2) class.

12 Dukes establishes that it's the proponent's burden
13 to justify depriving absent class members of their opt-out
14 rights. Objectors have no burden. Dukes establishes that
15 there is only one justification for a mandatory (b)(2) class
16 and that's what Dukes calls an indivisible injunction. That's
17 an injunction that provides identical relief to the entire
18 class at once.

19 And the evidence of justification, the evidence of
20 the indivisible character of the injunctive relief must be
21 sufficient to support findings of fact and must be evaluated
22 under the standard of heightened attention to that
23 justification.

24 And the Supreme Court, of course, explained why,
25 which is that the plaintiffs and defendants are now allying in

1 interest in terms of the settlement and you really don't have
2 an adversarial proceeding.

3 THE COURT: Doesn't parity surcharging across the
4 board provide that identicality of relief that the Wal-Mart
5 decision requires for a (b) (2) class certification?

6 MR. CANTER: It does not. Parity surcharging
7 affects different merchants differently. You've already heard
8 about Macy's, we'll talk about that a little more. There has
9 been no justification for why parity surcharging requires that
10 every merchant be bound. Merchants can decide for themselves
11 whether they want to surcharge or not. And they can decide to
12 give a release.

13 THE COURT: But it's a tool that's available to all
14 of the merchants who are covered by the proposed settlement.
15 Right? I mean, you don't have to avail yourself of every
16 benefit but it's a benefit that is available to every
17 merchant. So that's the distinction between what you're
18 saying and I would assume the argument made by the proponents.

19 MR. CANTER: Well, it's certainly not available to
20 the merchants in those surcharge states. That's clear as a
21 matter of law. There was a decision two weeks ago in Florida
22 sustaining that statute.

23 THE COURT: I didn't know about that decision. I'm
24 sure you'll tell me.

25 MR. CANTER: Your Honor, I actually have a copy I

Mr. Canter

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1 can pass up if I may.

2 THE COURT: At what level was it?

3 MR. CANTER: District Court, Northern District of
4 Florida.

5 MR. GERMAINE: We sent it. We sent it to the court.
6 We sent it to you.

7 THE COURT: Thank you.

8 MR. CANTER: So the prediction that these statutes
9 are going to fall was at least premature.

10 THE COURT: You don't have anything from the
11 11th Circuit yet?

12 MR. CANTER: No, that's just two week old.

13 THE COURT: Okay. Go ahead, please.

14 MR. CANTER: So as I said, we've got the
15 non-surcharge states and we've got Professor Hemphill's
16 conclusion that most merchants are not going to be able to
17 take advantage of that. What I want to address --

18 THE COURT: He doesn't think it's clear that they
19 would be able to because there's no data on whether they would
20 or could.

21 MR. CANTER: And I believe that that is --

22 THE COURT: Except for Australia.

23 MR. CANTER: But that is particularly significant in
24 view of the fact it's the proponents burden to bring forth
25 evidence under heightened scrutiny which justifies the

1 imposition of a mandatory class.

2 THE COURT: They're arguing that the Australian
3 experience with surcharging is instructive in that regard.
4 It's not as if we're dealing without any knowledge about how
5 the surcharging has worked in a major market. Australia is a
6 major market. It may not be California, but it's a major
7 market. So wouldn't that be supportive of that type of
8 finding on my part?

9 MR. CANTER: My understanding is that that evidence
10 is disputed. But beyond that point there is no justification
11 for saying to a merchant, we've got to have every merchant in
12 the country on this settlement for parity surcharging to be
13 effective.

14 Any merchant can decide for itself whether it wants
15 to be in this settlement or not and take advantage of parity
16 surcharging and give the release that AmEx wants. There is no
17 justification -- There's no necessity in the sense of an
18 indivisible injunction that every merchant has to be in this
19 settlement. The relief doesn't require it. The relief is
20 individual.

21 THE COURT: But a (b) (2) class does require, there
22 is no opt out in the (b) (2) class. Right?

23 MR. CANTER: Well, not on the face but there are
24 courts that have allowed opt outs from (b) (2) classes.

25 THE COURT: Are you suggesting that this court would

1 allow opt outs from a (b) (2) class?

2 MR. CANTER: Frankly, I don't know how else you
3 would vindicate the arbitration rights of the individual
4 merchants that have those rights without allowing them to
5 decide whether or not to protect those rights or to give them
6 up.

7 THE COURT: Well, the objectors here represent a
8 large portion of the merchant spend, all right, if you will.
9 The spend of merchants in the United States.

10 So giving them an opt out would potentially
11 eviscerate the benefit of this settlement the very large
12 number of small merchants who are not opting out.

13 MR. CANTER: Two responses to that. Number one,
14 that would be true only because American Express would choose
15 to walk away from the settlement under those circumstances.
16 It doesn't need to. Merchants who choose to stay in the
17 settlement can do so, can provide the release and can exercise
18 parity surcharging.

19 But more importantly, the Supreme Court actually
20 addressed this issue. Section IV of the Italian Colors
21 decision addresses the question of whether there is an
22 exception to Italian Colors which says if you really need to
23 have a mandatory class because the relief will only be
24 effective on a wide classwide basis, is that a basis to
25 override the arbitration rights. And the court answered no,

1 that the substantive rights supersede whatever benefit might
2 come from the settlement and that the issue of how beneficial
3 the settlement is, the Rule 23(e) issue, is not relevant to
4 the (a) and (b) issues.

5 I want to draw your Honor's attention to the Macy's
6 situation. And so Macy's entered into a co-branding
7 relationship with AmEx that Macy's believes is very valuable.
8 And here by the admission of the plaintiffs, Macy's would have
9 to surcharge its own card and then plaintiff's begin to
10 speculate and theorize about how Macy's can build a workaround
11 around that.

12 And I have just want to show very quickly. So this
13 is already actually been said here in the courtroom, but it
14 says, Macy could offer to give back the money. That's not
15 free. That's not easy, that's complicated, that runs the risk
16 of consumer confusion. It runs the risk of consumer
17 dissatisfaction. And the merchants are trying to tell Macy's
18 how to run its business. And Macy's respectfully doesn't need
19 that help.

20 So let me get back to the issue of justification.
21 AmEx makes a very important concession in its reply brief in
22 support of this settlement. And what it says is, that without
23 the uniformity and certainty of a non-opt-out class, American
24 Express has no incentive to continue with the settlement.
25 This is no justification at all.

Mr. Canter

1 The Supreme Court in Dukes is very clear. This is
2 all about the rights of the absent class members and the
3 justification that is required pertains to the character of
4 the relief. It has nothing to do with what American Express's
5 wishes are or demands are or negotiated position is. The
6 focus has to be exclusively on the character of the relief.
7 And this relief doesn't qualify.

8 You heard the testimony of, I believe his name is
9 Quagliata. He testified repeatedly. He said over and over
10 again that AmEx will negotiate nonstandard, nondiscrimination
11 provisions with merchants and they're willing to -- with
12 companies, that they want to have as their AmEx accepting
13 merchants, they're willing to have negotiations.

14 Paragraph 10 of the settlement agreement reserves to
15 AmEx the right to continue having those negotiations. They
16 can buy off the rights of certain merchants who they select
17 and they can say, we're going to give you money if you want
18 surcharge. If that is true, where is the justification for a
19 mandatory class?

20 And then finally I want to bring to your Honor's
21 attention, this was the last column on the colored chart.
22 This is the provision from the Luxottica agreement. Luxottica
23 is the company that runs LensCrafters and Sunglass Hut and all
24 of that. This is the provision that they negotiated. And I
25 have underlined and highlighted the relevant language which

Mr. Canter

1 says, if you wish to receive the consideration that goes to
2 the class, then you deliver us the same release that the class
3 gets. But it's Luxottica's option.

4 You've reserved the right to decline any remedies,
5 and we agree that you've retained your right to pursue an
6 individual claim that is not part of a class action.

7 So this looks like for all the world like an opt-out
8 right, to me. And there's three of our clients that have
9 these. And if these three clients have that right, why
10 shouldn't every merchant have that right. Where is the
11 necessity in the relief that it be indivisible so that it's
12 imposed on every merchant?

13 THE COURT: So what you're saying is that if you're
14 large enough you can negotiate an opt-out right but if you're
15 not you're stuck? Is that what you're saying?

16 MR. CANTER: I can't say that because I don't know
17 what all the agreements look like that American Express has.
18 I've only seen 18 of them. And those 18 we've displayed for
19 you. And three of them who actually are not very large, the
20 NRF is very small in terms of the amount of transaction volume
21 that it has.

22 THE COURT: What does Luxottica do?

23 MR. CANTER: Luxottica --

24 THE COURT: What is their business?

25 MR. CANTER: Sunglass Hut.

1 THE COURT: Yeah, Sunglass Hut.

2 MR. CANTER: And LensCrafters. And they have --

3 THE COURT: International chain?

4 MR. CANTER: International chain. They have about
5 two and a half billion dollars in retail sales through their
6 chain. They also have a lot of wholesale business. But
7 through their chain that's what they have.

8 So let me turn to one last issue in the few minutes
9 that I have, and that is the mandatory release. The release
10 violates both Rule 23 and the due process clause. Dukes is
11 clear, the only claims that can be resolved through a (b) (2)
12 mandatory class are those claims that can be resolved through
13 indivisible injunctions. And this release does two things.
14 It resolves a whole host of unspecified injunctive claims and
15 it releases a whole host of money damages claims.

16 It can't release, under Dukes, in a mandatory class,
17 the claims for injunctive relief because there has not been
18 the proceedings and the heightened scrutiny and the evidence
19 to demonstrate that those claims can be resolved by an
20 indivisible injunction. And the monetary claims cannot be
21 resolved because Dukes simply prohibits resolving monetary
22 claims through a (b) (2) mandatory injunction.

23 The proponents argue that that limitation in Dukes,
24 that prohibition should be interpreted to apply only
25 retrospectively and should not apply to prospective damage

1 claims, individualized damage claims. But that's not
2 consistent with Dukes.

3 Dukes draws are very simple line. Indivisible
4 injunctive claims, yes, those can be resolved if the proper
5 demonstration has been made. But individualized damage claims
6 can never be resolved. It says nothing about when those
7 damage claims are or are not incurred.

8 So our problem with the mandatory release is we've
9 gone through a long proceeding and we're going to go through a
10 long proceeding today that's going to focus on the relief that
11 the class gets the parity surcharging. And one of the things
12 your Honor will be looking at is, is it indivisible in
13 character. And if your Honor finds that it is, and we think
14 you should not, but if you find that it is, then in through
15 the back door with no scrutiny whatsoever comes all of these
16 other claims that are resolved and all the injunctive claims
17 and all the monetary claims.

18 So for all of those reasons we think the settlement
19 must be rejected. We thank you for your time.

20 THE COURT: Thank you very much. Okay. I think we
21 should take a ten-minute break. We'll take a ten-minute
22 break.

23 (Brief Recess.)

24 (Continued on the next page.)

25 (In open court.)

Mr. Shinder

1 THE COURT: All right. The next objector group will
2 be the 7-Eleven objector group. And speaking for that group
3 is Mr. Shinder, from Constantine Cannon.

4 MR. SHINDER: Yes.

5 THE COURT: Mr. Shinder, welcome.

6 MR. SHINDER: Good afternoon, your Honor.

7 THE COURT: Good afternoon.

8 MR. SHINDER: Jeff Shinder from Constantine Cannon,
9 the 7-Eleven objectors.

10 Your Honor, the proposed settlement is the product
11 of American Express exploiting a virtually defunct class case
12 to engineer a settlement that protects it from the competition
13 that matters, the competition it's most afraid of -- brand
14 competition via differential surcharging. But this deal is
15 worse than one that merely perpetuates the status quo.
16 Because by proposing to lock in anticompetitive rules through
17 a court approved settlement that includes an impermissible
18 forward looking release, this settlement actually threatens to
19 make a bad situation even worse.

20 Your Honor, for my clients the backdrop of this deal
21 is deeply troubling. On the one hand, you have plaintiffs,
22 who during the litigation phase of the case repeatedly said
23 their case was about engineering price competition between
24 American Express and rival networks like Discover, who now
25 disavow the importance of that and contend that that

1 competition is comparatively trivial to the supposed benefits
2 of parity surcharging.

3 On the other hand, you have American Express, who in
4 the DOJ case claimed that softer forms of steering, of
5 differential steering could threaten its very existence; but
6 in this proceeding they are all too willing to agree to parity
7 surcharging, which will lock in a situation where the
8 differentiation they're afraid of will never happen. Against
9 that backdrop, your Honor, this settlement must be rejected
10 for three reasons:

11 First, it must be rejected because the proposed
12 mandatory settlement class should not be certified for the
13 reasons Mr. Canter stated;

14 Second, it must be rejected because the deal that
15 offers merchants virtually nothing, a conclusion that
16 Professor Hemphill found -- and I'll come back to that in a
17 minute -- while releasing potentially forever valuable claims
18 against differential, the rules that bar differential
19 surcharging --

20 THE COURT: You don't really believe that it will
21 release it forever? I mean, changes occur; markets change
22 rather often and rather quickly and we have -- we don't have a
23 crystal ball that these provisions won't be altered
24 substantially in five or ten years that would lift the
25 injunctive nature of the agreement as to the class. Wouldn't

1 you agree with that?

2 MR. SHINDER: No. Actually, your Honor, I would
3 respectfully disagree with that.

4 THE COURT: Why?

5 MR. SHINDER: If the settlement is approved, there
6 would be no incentive for American Express to alter the rules.
7 The parity surcharging rules that is agreed to here, it's not
8 protected by that at all. It protects them against the
9 differentiation they're afraid of. And this release, because
10 it's tied to the release in the MDL-1720 settlement, could
11 potentially go on forever. And the release also reaches
12 substantially similar versions of the rules and the future
13 effect, claims concerning the future effects, getting to your,
14 you know, the market may change. Well, the release reaches
15 claims concerning the future effects of those rules, including
16 future versions of those rules. So they would have no
17 incentive -- as long as Visa and MasterCard stay within the
18 MDL-1720, and they have this, they have no incentive to change
19 the rules, and this could go on forever.

20 THE COURT: When an investor or an investor group
21 decides that they're going to enter the credit card issuing
22 market, that could change everything, couldn't it, if they
23 decide that they're going to get in it? And that requires
24 then that Visa, MasterCard, American Express, and Discover
25 make adjustments to their business models. That's a

1 circumstance that could occur, if they saw the credit card
2 business -- if there were a group of investors that saw the
3 credit card business as, you know, fertile territory for
4 profit.

5 MR. SHINDER: The scenario you postulated was about
6 investors on the issuing market. The market in which they
7 compete is the network market for merchants. There has been
8 no material entry into that market since Discover in 1985. It
9 is still the four brands. That's telling. And, yeah, we can
10 speculate, who knows what's going to happen in 20 years. Of
11 course I don't have a crystal ball.

12 THE COURT: Well, this agreement invites us to
13 speculate, don't you think?

14 MR. SHINDER: And that's the problem. What I can
15 tell you safely today, if you approve this and parity
16 surcharging is the, you know, quote/unquote, law across the
17 three dominant brands, they will have no incentive to change
18 their rules. And if nothing else changes going forward, this
19 release could go on forever. That's a problem. That's a
20 problem. That's the third reason why this settlement should
21 be rejected.

22 So let me just go back over some of those points.
23 On the settlement class certification, you know, issues, we
24 wholeheartedly agree with the argument that you heard from
25 Mr. Canter -- and we will not burden the Court with rehashing

1 any of them -- but I want to address one question you posed to
2 Mr. Canter, your Honor, which was the evidence from Australia,
3 does it support certification of this mandatory settlement
4 class? And the first thing I'd say about Australia, your
5 Honor, is, you know, we are weary. We invite the Court to be
6 weary about accepting Australia as being opposite to the
7 United States, for various reasons, and we rely on our papers.

8 For the sake of discussion, let's say Australia is
9 opposite. What does it tell you, in terms of certifiability
10 of this class? What Australia shows is it took time for
11 surcharging to take hold -- years. And so let's say that
12 would be the case here, that parity surcharging would spread.
13 They would be pioneers. More and more merchants would do it.

14 What that shows, especially when you juxtapose that
15 against the fact that you have some states that band the
16 practice and some states that don't, the circumstance you
17 don't have in Australia, is that over time some merchants are
18 going to benefit -- again, assuming there's value in this,
19 which we don't -- and others won't. In fact, it's even worse
20 than that. Let me pose a hypothetical.

21 You've got a gas station on the border of Texas,
22 Texas and Arkansas, and another gas station across the street
23 in Arkansas. One state bands surcharges, the other state does
24 not. So the merchants in Arkansas engage in parity
25 surcharging, and it's as beneficial as Mr. Friedman said. It

1 will benefit at the direct expense of its competitor across
2 the border. That is the essence of a situation where you have
3 a class -- where you have a supposed class relief that benefit
4 some to the detriment of others. That can't possibly be a
5 cohesive class, especially in a mandatory context, whereas the
6 Supreme Court said the relief must be indivisible and provide
7 relief to the entire class at once.

8 And so Australia actually refutes the
9 certifiability, sorry, your Honor, of the (b)(2) class.

10 THE COURT: Let me ask you about this. If you go to
11 a gas station now -- let's bring it down to its simplest basic
12 set of facts. You go to a gas station and there are two
13 prices for a gallon of gas. One is the cash price and the
14 other is the credit card price. All right?

15 And is there any reason to believe that people --
16 that customers, consumers are reluctant to use a credit card
17 because they can pay 10 cents less at the cash price than at
18 the credit card price? That's a surcharge right there. Is
19 there any evidence to indicate that consumers try to find a
20 place where there's no difference between cash and credit
21 card?

22 MR. SHINDER: I don't have any evidence of that,
23 your Honor. It may well be that consumers want their rewards,
24 so they're perfectly comfortable, you know, with paying, you
25 know, with a credit card in that situation. I don't have any

Mr. Shinder

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1 evidence of that, but --

2 THE COURT: That goes to the question of whether
3 consumers are worried about a surcharge.

4 MR. SHINDER: Well, that's -- that scenario is a
5 discount as opposed to a scenario where they're facing a
6 surcharge, which --

7 THE COURT: Well, it is a surcharge.

8 MR. SHINDER: It's a more forceful form of steering,
9 so it doesn't necessarily --

10 THE COURT: Why is that a discount as opposed to a
11 surcharge?

12 MR. SHINDER: What I understand your hypothetical to
13 be, it's a gas station and it says, I'll discount if you pay
14 with cash --

15 THE COURT: No. No. It says, this is the cash
16 price, which is the basic price. But if you care to use a
17 credit card, there is an additional charge of 10, 15 cents per
18 gallon of gasoline.

19 MR. SHINDER: Well, the way that plays out in the
20 real world, is it's used as a discount for cash. And so
21 consumers see that, I get a discount if I pay with cash, at
22 one price and it has a lower price.

23 THE COURT: It's interesting you see it that way.

24 MR. SHINDER: So they're not posted it as a
25 surcharge.

1 THE COURT: Go ahead.

2 MR. SHINDER: So let me address some of the
3 substantive fairness issues in the time I have left. This
4 really is very simple. Professor Hemphill nailed it. We
5 concluded that, quote, there is a substantial probability that
6 the proposed settlement's effect will be small or zero.

7 That's at page 42 of his report. His bottom-line conclusion
8 leaves no doubt, no doubt that the proposed deal will provide
9 little or no value for several reasons, including the
10 following: That few merchants, if any, with parity surcharge,
11 due to state restrictions -- and I will note, as Mr. Canter
12 did, that one of those restrictions was just upheld in
13 Florida; fewer customer defections and technical impediments;

14 Two, that unlike brand surcharging, parity
15 surcharging, quote/unquote, lacks the tools to generate
16 inter-brand competition and class parity surcharging almost
17 certainly would not inject any price competition or result in
18 price reductions for merchants;

19 And three, the differential surcharging by contrast
20 introduces a, quote/unquote, clear mechanism by which
21 meaningful price competition and price reduction for merchants
22 can resolve. And all of the experts, your Honor, that have
23 commented on this settlement agree with that conclusion. Let
24 me repeat that. All of the experts before you agree,
25 including plaintiffs' expert, Dr. Frankel, that differential

1 or brand surcharging would be highly pro-competitive and, yet,
2 the proposed settlement would bar that practice potentially
3 forever.

4 How can such an anticompetitive outcome be the
5 proper resolution of an antitrust case? Your Honor, we submit
6 that the answer to that is self-evident.

7 Now, plaintiffs' response to Professor Hemphill's
8 dispositive conclusions includes a lot of smoke and mirrors
9 about parity versus differential surcharging in Australia and
10 talk about different reports from Australia. I will leave the
11 response to that to others.

12 But when it came to Professor Hemphill's emphatic
13 conclusion that there is, quote, little demonstrated merchant
14 appetite for parity surcharging in the United States,
15 plaintiffs are tellingly silent, other than saying, We should
16 look at Australia again. Last I checked, the geographic
17 market in this case is the U.S., not Australia. This case is
18 about competition here. And if anything, Professor Hemphill's
19 conclusions regarding U.S. merchants' lack of appetite to
20 engage in parity surcharging were understated.

21 You have before you today an awful lot of the top
22 merchants in this country, from Wal-Mart to Amazon to
23 Starbucks to 7-Eleven to Target to Macy's, I can go on and on,
24 to Home Depot, not to mention pretty much the entire
25 supermarket and drugstore industry. Beyond Wal-Mart and

1 Amazon, our group alone includes leading merchants from
2 literally every merchant sector and trade associations like
3 RILA, NACS, and the NJA, that represent thousands of
4 merchants. These merchants are vigorous competitors and they
5 disagree on almost everything. But today they stand before
6 you united in opposition to this deal, saying the same
7 thing -- that parity surcharging is of little or no value to
8 them and they want out.

9 This Grinnell factor, the most important factor in
10 that analysis should easily end the fairness inquiry. Your
11 Honor, in highlighting the universal opposition to the
12 settlement amongst the merchants that have come forward to
13 address this settlement, not one merchant has come forward to
14 support it, other than the proposed class reps. I cannot help
15 but note how unreasonable it is to even suggest that a
16 mandatory class should extinguish their claims on the
17 recommendation of proposed class reps who have barely
18 litigated the issues.

19 As Professor Hemphill put it, quote, the plaintiffs'
20 anti-steering case is still at an early stage and lacks a well
21 developed presentation of the merits, closed quote.

22 At the risk of some understatement, your Honor,
23 allowing the views of proposed class representatives who have
24 not developed a case, who know knowing about the objectors'
25 businesses, to trump the considered objections of

1 sophisticated merchants, who should presume to know what is in
2 their best interest, cannot be justified.

3 Before concluding on the fairness issue I would like
4 to address American Express' repeated invitation in this reply
5 to the Hemphill report that the Court defer its evaluation of
6 parity surcharging until the DOJ market definition questions
7 are resolved. If anything, American Express' insistent
8 request is a powerful admission that the plaintiffs today have
9 failed to discharge their burden of showing the fairness of
10 the settlement based on the record that is before your Honor.

11 After all, what American Express is really saying is
12 that even though a lot of them -- the largest merchants in the
13 country have come forward to say that parity surcharging is of
14 no value and even though the independent expert, after
15 reviewing plaintiffs' evidence and arguments, found that
16 parity surcharging is likely of little or no value, the
17 evidence in another proceeding, that's not here today, should
18 somehow trump those conclusions and those objections.

19 That should be rejected out of hand, your Honor. It
20 would be patently unfair to allow plaintiffs, after they
21 failed to discharge their burden today, to supplement their
22 showing with evidence from another proceeding, evidence that
23 the objectors have had no ability to challenge or respond to.
24 That unfairness is magnified by the fact that that improper
25 supplemental showing would be in service of a mandatory class

1 settlement that purports to extinguish their claims.

2 Lastly, even if it were proper to do what American
3 Express request, the evidence in the DOJ case, which was not
4 directed at parity surcharging or the question of whether such
5 surcharging would be negated by customer defections, is highly
6 unlikely to cast a meaningful new light on the settlements'
7 lack of value.

8 Before I conclude, I'd like to make a few points
9 about the DOJ case, since its relationship to this inquiry has
10 been raised.

11 First and foremost, no matter what happens in the
12 DOJ case, this settlement should be rejected. We say that for
13 two main reasons: First, the predicate question your Honor
14 has to address is whether the mandatory -- the proposed
15 mandatory settlement class can be certified. And we submit
16 that it should not be certified. That inquiry is entirely
17 independent of the DOJ case;

18 Second, even if the DOJ were to lose, and let me be
19 clear, we think it should win, but even if the DOJ --

20 THE COURT: Mr. Hammer is happy to hear endorsement
21 of his position. Go ahead.

22 MR. SHINDER: Even if we were to lose, that result
23 would have little or no bearing on the key questions that go
24 to fairness here, this parity surcharging having a meaningful
25 value, the DOJ has litigated that. And can a settlement that

1 jettisons strong merchant claims against differential, the
2 rules that bar differential surcharging while inshrining an
3 impermissible forward looking release cannot be justified.
4 The DOJ didn't address those questions either.

5 The second broad point I want to make, is that if
6 the DOJ wins, this settlement must be rejected -- period; full
7 stop. As your Honor is well aware, after seven weeks of
8 trial, the DOJ case is about stimulating, for the first time,
9 true inter-brand or network competition by giving the
10 merchants the ability to engage in differential or brand
11 steering.

12 Even plaintiffs' expert, as I said before, readily
13 conceives that differential steering is much more likely than
14 parity surcharging to give merchants what they really want --
15 the ability to play the networks off against each other to get
16 price concessions and inject some real competition into this
17 marketplace, like they do with vendors and suppliers in every
18 other industry every day. Against that backdrop it is pretty
19 clear, that if the DOJ wins, it will become immediately
20 apparent that the relief in this settlement would be entirely
21 superfluous. Because of the DOJ, merchants would have the
22 valuable steering tools that they want, and parity surcharging
23 would be, at best, a useless dead letter and, at worst,
24 confusing, because some merchants might have a hard time
25 understanding why they can differentiate via discounting and

1 soft steering but not via surcharge.

2 THE COURT: But even if the -- if the Department of
3 Justice is successful, one can assume that the process of
4 appeal is going to go on for many years, it could even end up
5 to the Supreme Court. And in the meantime if the settlement
6 agreement is turned down, the merchants won't have the benefit
7 of being able to surcharge during that entire period. So
8 they're not going to get the benefit of the settlement, to the
9 extent there is a benefit, even if the DOJ wins their case.
10 It's going to be a long time and coming. There's going to be
11 years and years and years, I assume, based on how fast the
12 litigation process operates at the appellate level. There are
13 7,000 pages of transcript in the government case and 1,000 --
14 more than 1,000 exhibits, and the issues are very complicated.

15 What harm is done by allowing the parity surcharging
16 as long as that's going on?

17 MR. SHINDER: The harm is done. I'm going to assume
18 your question presupposes approve the settlement, parity
19 surcharging.

20 THE COURT: Just as for the sake of argument.

21 MR. SHINDER: And for the sake of the harm that is
22 done, it's locking in, through a court approved settlement, an
23 anticompetitive construct and approving a release that reaches
24 forward and permissibly that is worst than getting nothing.
25 And so that would be affirmatively harmful.

1 But getting back to the point I was making. I'll
2 take your point, that there is an appeal. There may or may
3 not be a stay pending appeal, but what I'm trying to do is
4 focus your Honor on the two -- the results of the DOJ case
5 highlights it. If they win and they survive appeal, assuming
6 there is a stay pending appeal, and they give merchants the
7 ability to differentiate in different ways by steering, parity
8 surcharging is useless. It just highlights once more how
9 little value there is in the settlement. That's the point I'm
10 trying to make.

11 THE COURT: Do you think that the court's choice as
12 to whether debit is in the relevant market for antitrust
13 purposes, in the Justice Department case, has any bearing on
14 what's done here?

15 MR. SHINDER: It doesn't, your Honor, actually for
16 the reasons that Professor Hemphill -- he talked about this in
17 his report, that market definition does not dispositive that.
18 The granular question is whether customer defection is --
19 whether the lack -- the low level of substitutability between
20 credit and debit in most venues would apply an amount of
21 customer defection, such that most merchants wouldn't engage
22 in parity surcharging. While substitutability between credit
23 and debit is obviously embedded in the market definite
24 inquiry, if you were to find that the market is a broad one,
25 American Express postulates, which, if you want my opinion,

1 would be a mistake. But let's say you were to find them.
2 That would not be dispositive of the question that matters
3 here, which is -- and as Professor Hemphill laid out, it
4 doesn't take much in the way of customer defection to render
5 parity surcharging unprofitable. You know, there is some
6 overlap but it's a distinct question.

7 THE COURT: All right.

8 MR. SHINDER: I'm out of time but I do have --

9 THE COURT: Is anything else briefly that you want
10 to add?

11 MR. SHINDER: Well, I'd like to, if I may, just
12 comment on a slide that Mr. Friedman talked about.

13 So, your Honor, I talked at length about what
14 American Express is really afraid of and what matters is
15 differentiation at the point of sale via surcharging. This
16 settlement is all about protecting them from that. So
17 assuming AmEx would allow this. Well, here's why:

18 First of all, a few things to say about this. This
19 scenario preserves the parity regime and lack of
20 differentiation at the point of sale. What Mr. Friedman is
21 saying, Well, even though there cannot be differentiation at
22 the point of sale, the competition that matters to American
23 Express, Discover can do this, you know, in terms of its
24 communication with cardholders. This goes on everyday already
25 in the current world. This is the equivalent of an award. So

1 it's --

2 THE COURT: This is the slide -- just for the sake
3 of the record, this slide doesn't have a number. So this is
4 the slide that displays only the Discover logo and it says:
5 *Your credit card surcharges are on us. Surcharges will show*
6 *up on receipt but never on your monthly bill.* And this has
7 only the Discover logo and not the merchant's logo on it.

8 MR. SHINDER: Yes.

9 THE COURT: As opposed to the other slide which had
10 two logos on it?

11 MR. SHINDER: Yes.

12 THE COURT: Go ahead.

13 MR. SHINDER: So what I'm trying to convey is this
14 competition, Mr. Friedman has a Rico moment. Yes, this is
15 going to happen. This happens already. Discover is free to
16 advertise and no one restrains them from doing this. The
17 consumer, you know, use your Discover card at a gas station
18 over the summer and I will -- you know, we will spruce up your
19 cash back. We'll give you 5 percent instead of 2 percent.

20 I know a little bit about Discover because I
21 represented them for years. They're free to do this today.
22 There's nothing about this that introduces any competition
23 that doesn't happen today.

24 The other point is this kind of promotion would only
25 make sense if parity surcharging were to take hold. A

1 predicate to this is there's lots of parity surcharges such
2 that Discover can say, you know what, instead of saying to
3 customers over the summer, where the gas bill spikes, we'll
4 add some cash back, we'll do this instead.

5 Again, knowing something about Discover, the only
6 way that they're even going to consider that is if there's
7 lots of parity surcharging, and for all the reasons that I've
8 said and what Professor Hemphill said, it's not going to
9 happen. It's not going to happen.

10 THE COURT: All right, thank you very much.

11 MR. SHINDER: Thank you.

12 THE COURT: Okay. And finally this morning we'll
13 hear from Mr. Arnold. Welcome back, Mr. Arnold.

14 MR. ARNOLD: Thank you. But before we start my
15 clock, your Honor, I have a question I would like to answer,
16 but it's not my area. I'm going to be pushed for time any
17 way, and I've -- as an opponent of the chess clock in a trial,
18 I shouldn't be doing this. The question you asked
19 Mr. Shinder --

20 THE COURT: Oh, I'm going to start the clock.

21 MR. ARNOLD: Well, I was hoping I could hold on to
22 these documents.

23 THE COURT: And if you have more to say, we can save
24 it until after lunch. If I stop the clock, I'm going to have
25 20 lawyers asking me to stop the clock. I know how that

1 works. It's sort of a creeping insidious process.

2 MR. ARNOLD: Real quickly. The question you asked
3 Mr. Shinder about whether -- would there be some relief from
4 the American Express settlement while the Government appeal
5 goes, whichever way its going. You heard Mr. Friedman say
6 there's going to be an appeal from this also. American
7 Express has not committed itself to change a thing until all
8 of these appeals are run; every one of them are run. So
9 they're going to be running a parallel course. There's not
10 going to be any relief coming out of this, and that's it.
11 That's my answer and I will now go to what I was delegated to
12 come up here and talk about.

13 Your Honor, I have some exhibits. May I pass these
14 up?

15 THE COURT: Are you going to put them up on the
16 screen?

17 MR. ARNOLD: Yes, we are. But I may not be -- I
18 hate doing this, but I've got a lot of evidence, so I want to
19 try to have this here. If I don't get through all of them,
20 you have them in front of you.

21 THE COURT: Is that on?

22 MR. ARNOLD: Okay, there it is, your Honor. Thank
23 you.

24 THE COURT: There you go.

25 MR. ARNOLD: Now, in starting this, my -- what I

1 wanted to do is get up here and talk a little bit about this
2 settlement versus the underlying merits of a powerful
3 antitrust case. But before I start, there's something that
4 I'd like to talk about, and that is, that the Visa-MasterCard
5 case, throughout that case and particularly during the really
6 contentious mediation and approval process, Judge Gleeson
7 regularly reminded everybody participating, including people
8 that weren't happy with the settlement, that this was an
9 antitrust case -- no more and no less. That he couldn't do
10 more nor could the class be asked to do more than the
11 antitrust laws would permit.

12 Most of the objectors -- and it was a lot of
13 publicity to the objections there. And it had a lot to do --
14 not with the number, because the number is strong here. And
15 you haven't heard a lot of publicity here. The reason was,
16 there was some lobbying efforts in congress, they were trying
17 to get evidence up there. They admitted it in the fairness
18 hearing, that that's what they were doing. So there was a lot
19 of publicity, a lot of news releases and stuff about our
20 position, you aren't reading here. But our position here is
21 more united, more clear, and more focused on exactly what the
22 problem is.

23 Now, the objectors in the Visa-MasterCard case were
24 wanting more. They wanted basically rate regulation. They
25 wanted the interchange fees to be -- in some way for

1 Judge Gleeson to interfere with the setting of those rates.

2 And Judge Gleeson kept reminding us, this is a market solution
3 and that's all we can get done here.

4 Now, he also pointed out that some market solution,
5 that he could deal with only Visa and MasterCard. And he
6 pointed out that there was an American Express problem. And I
7 think I'll get this right on the first one.

8 And he said in his order, there was an American
9 Express problem. And he reminded all of the litigants, and of
10 course we were there supporting the class settlement, the
11 lawyers and the clients that are in front of you, the
12 individual merchants case were supporting that settlement.
13 And we were supporting that settlement because it did take all
14 it could do to unleash the market forces of horizontal price
15 competition for network services. That's what that was.

16 Now, the objectors here are united because this is
17 an antitrust case -- no more, no less. The class here is
18 attempting to get a relief and give a pass to American Express
19 going forward for less than what the antitrust laws require.
20 This case was brought to introduce horizontal price
21 competition into this marketplace where it's clearly absent.
22 This settlement, and we're all united in it, does not do that.
23 In fact, it could be worst than that.

24 Now, what the worst part of it is, that if -- and as
25 Judge Gleeson said, that if American Express is the only

1 remaining major network, its insulated price competition will
2 assist in the efforts to fix it.

3 Now, Mr. Friedman suggesting that that American
4 Express problem that he was talking about being fixed by this
5 settlement is inaccurate. It's not correct. It does not
6 introduce any horizontal price competition. It actually
7 interferes with it. Because parity surcharging does not allow
8 for any merchant to award any lower rates.

9 So you're actually going to encourage an escalation
10 of rates. Because American Express can keep raising their
11 rate and say, Well, I can't be surcharged any more than Visa
12 and MasterCard, so I can keep pricing it up. It actually has
13 a reverse effect.

14 THE COURT: Well, let me just point out that there
15 are limits on what the plaintiff class representatives could
16 do in this case that didn't exist.

17 MR. ARNOLD: There's no question.

18 THE COURT: No, no. When the Visa-MasterCard case
19 was being resolved, and that is basically -- these class
20 representatives have been to the Supreme Court three times in
21 Italian Colors. So, you know, now there are more limited
22 options. Right?

23 MR. ARNOLD: Well, no, there's more limited options
24 for them to litigate in the Federal Court but that certainly
25 tells you why they should not be allowed to come to Federal

1 Court and try to give away everyone else's rights, including
2 my client's rights, who are here in court, who do not have
3 limited options. Who are -- who are prepared and have a fully
4 discovered case and prepared to move ahead, hopefully not long
5 after the Government's case.

6 But, your Honor, the biggest problem with this is
7 that if you approve this settlement, after seven hard years of
8 litigation in the Visa-MasterCard case, you would have
9 basically helped them take away the -- what was fought for in
10 the Visa-MasterCard case. Because as Judge Gleeson pointed
11 out, he could only affect the Visa-MasterCard activity. This
12 case is designed -- our case is designed to take and others
13 who want to litigate with them.

14 Our clients, by the way, are here in court. We're
15 not looking for an arbitration discussion or anything else,
16 because we're here. But this settlement would take away our
17 ability and all the other merchants in the country ability to
18 utilize the ability -- I mean the Visa-MasterCard settlement.
19 And Professor Hemphill noted that in his report. And
20 Professor Hemphill got this report right.

21 There's a couple of questions that he asked in
22 there. But given the record he had and given the fact that
23 we've lived with this case for all of these years, we were all
24 terribly impressed with the way he was able to understand this
25 stuff, as we go through.

1 THE COURT: May I ask a historical question?

2 MR. ARNOLD: Yes.

3 THE COURT: Why is it that this -- this case was not
4 part of that case or that it was not added to that case?
5 Because I would have been delighted to share or to provide
6 this case to Judge Gleeson.

7 MR. ARNOLD: Your Honor, as you well know, the
8 Eastern District of New York has the rule that related cases
9 goes to the judge to decide whether it's related or not. We
10 filed our case, said it was related. Judge Gleeson declined
11 it. I think it was a gift to you, a Christmas gift.

12 THE COURT: He's done that to me before.

13 MR. ARNOLD: He did it this time, your Honor,
14 because he had the opportunity. But I honestly think, having
15 put in his ten years -- eight or nine years in the Wal-Mart
16 case and the six or seven more here, I think at the moment
17 when he turned it down, we were in the middle of that case, he
18 had not emersed himself in the details. I think if we had
19 filed the case right during that mediation, I believe he would
20 have taken it, because by then he understood that this was a
21 three-prong problem.

22 THE COURT: I was just curious. I'm delighted to be
23 here with you.

24 MR. ARNOLD: We gave him all the chances in the
25 world to help you out, but unfortunately --

1 THE COURT: I tried several times to help me out but
2 nobody agreed with that. Go ahead.

3 MR. ARNOLD: I want to back up just one moment,
4 because a lot of this conversation, and sometimes when you
5 were asking questions trying to parse what's going on here
6 with what people's positions are and, for example, when
7 Mr. Shinder was saying that what you thought was a surcharge,
8 he said was a discount.

9 THE COURT: Well, we have a disagreement about that.

10 MR. ARNOLD: Here is the point, you don't have to
11 disagree.

12 THE COURT: Because we never had a surcharge until a
13 certain point when, as I understand it, there was an added
14 charge to the -- to the station owner for accepting credit
15 payment, credit card payment. And I don't know how that came
16 about, but that's how it was explained to me at the point of
17 sale on one occasion.

18 MR. ARNOLD: But here's my point.

19 THE COURT: Go ahead. That's not evidence in this
20 case. I'm just asking the question.

21 MR. ARNOLD: No, no. But the point, what is
22 evidence in this case is that every economist agrees that a
23 price is a price. Surcharging and discounting are just
24 prices. What -- what's happened here, when Visa and the banks
25 years and years ago were fighting this, just like American

1 Express is fighting it now, they were able to get legislation
2 in some of these states to put a pejorative label on
3 surcharging.

4 And the truth is -- you have a background in the
5 airline industry -- the airline industry has unfolded this,
6 it's called -- any modern economist will tell you, those are
7 antiquated terms -- it is called unbundled pricing. That is
8 attributing the price to the cost generator. That's how you
9 do it, and it's called unbundled pricing. And that's why in
10 New York Judge Wyckoff found the statute unconstitutional,
11 because it was -- it was stopping the communication, it wasn't
12 stopping surcharging. It was simply saying, you can't call it
13 surcharging.

14 The example is -- you hit on it yourself, at the gas
15 price. The example is, the price is a dollar. If you use the
16 card I want you to, it's 98 cents. That's a discount. The
17 price is 98 cents. You use the cards I don't want you to use,
18 it's a \$1. That's a surcharge. That's an absurdity in
19 economic terms.

20 It's only because it's nomenclature and it helps.
21 I've been wrestling with this for years. Once you get that in
22 your head, this other stuff, you see it's a bunch of arcane
23 rules that are plugged in here, all for the purpose of
24 avoiding by the banks and the networks and American Express,
25 avoiding horizontal price competition between each other. No,

1 you can't do that. So you can't set a price communication in
2 any direction. And when you step to that, then this case
3 becomes much simpler, and it's simple for this simple reason.

4 The American Express rule clearly restrains
5 inter-brand price competition, and everybody agrees on that.
6 Everyone agrees on that, including American Express. And
7 they -- they have a defense. Now, I'm not raising by their
8 defense, and I'll talk about that in a minute. But this is --
9 this is Mr. Funda, his trial testimony here. He says, and
10 this, your Honor, if I wanted to title it differently, I would
11 say that this is a confession of a monopolist, that's what it
12 should be subtitled. Because what he says here is, when asked
13 if -- if American Express ever tries to lower its price to
14 compete for business, and he basically says, I don't think
15 anybody's business strategy is to be cheaper than the next
16 guy.

17 Well, he should be in other businesses because a
18 merchant, every client in this place and objecting to this,
19 their object is to control their cost and be cheaper than
20 their competitor.

21 Now, if you provide some quality, then people may
22 pay the extra price, but they choose to insulate themselves
23 from price competition with these rules. And so in the end he
24 says, no, we don't compete on cost. Basically he's saying the
25 reason they don't compete on cost is because they have these

1 rules that doesn't require them to compete on cost.

2 Every merchant in America would sign up for a rule
3 like that, if they could get them. The problem is, they
4 can't. They've been able to embed this thing into a process
5 that evolved over the advancement of economics and law coming
6 together that this thing is now seen as being illegal. They
7 got away with this for years. The law used to count up market
8 sharing percentages instead of looking at the direct group of
9 market power, which you recognized in your summary judgment
10 opinion in the Department of Justice.

11 Now, I want to keep moving. What I want to point
12 out here is that everyone, the experts, American Express'
13 experts in the DOJ case, Professor Gilbert; the expert in our
14 case, Professor Ordover; Professor Stiglitz, our expert;
15 Dr. Frankel, the class's expert; Dr. Katz, the expert for the
16 Department of Justice, they all agree that this restrains
17 inter-brand competition, as does American Express. And this
18 is the one that's most important to me.

19 I'm going to skip ahead here. And that is that
20 Discover and MasterCard agree that it restrains, and so does
21 Visa. Visa recognizes and they've changed their rules.

22 And so in the class case they all recognize that it
23 restrains horizontal price competition, and they walked away
24 from it. Only American Express, still on the wrong side of
25 history, is hanging on to this thing. And what we are

1 suggesting is that if you look at the Discover testimony --
2 now, I've been doing antitrust litigation for over 40 years,
3 and I've never seen a better competitor testimony than the
4 testimony presented right here in your courtroom, in which
5 Discover -- there's no hypotheticals here. Mr. Friedman is
6 talking about hypotheticals. There's no hypotheticals here.
7 This is a company that launched the very product that we're
8 saying would come into play in this nation, if these rules
9 were removed, and they couldn't get any traction with that
10 product because of these rules. They eventually just raised
11 their price and became one with a club, and he basically told
12 you here that their business model, they would return to it if
13 this rule was removed. And what they did, that starts the
14 downward spiral, it introduces the horizontal price
15 competition. So there's no hypotheticals here.

16 You have in your courtroom under oath the man who
17 has the company that launched the very product that all these
18 merchants are here saying that we'll change -- we'll change
19 the surface here of competition in this country if American
20 Express' rules are removed.

21 Now --

22 THE COURT: The settlement. We're going to talk
23 about the settlement too.

24 MR. ARNOLD: I am going to talk about the
25 settlement. But remember -- I should have put on my -- I

1 should have had a T-shirt on that said Grinnell IV. I'm up
2 here on the fourth element, and that is the strength of the
3 case. That is the strength of the case that's being given
4 away here in this -- we're virtually zero. This is a case
5 that has tremendous power and traction and is being basically
6 the injunctive relief and the ability to do something about
7 this and interject this competition is being basically given
8 away.

9 The truth is, your Honor, I don't know how we are
10 here. This settlement gives away way, way too much for a case
11 like this and locks all these merchants into this. But I
12 recognize we have to go through this process and I apologize
13 if I've gotten a little too excited about it. But
14 Professor Stiglitz, who is our professor, but here's a guy who
15 has done a number of major issues for countries and
16 governments and everyone else. He basically says here that,
17 that various entry are created, you're not going to get any
18 new competition. As you were asking earlier, would a group of
19 investors come into this? The answer is no, they will not
20 come in as long as they cannot differentiate themselves in
21 some way.

22 Discover is the last entry. And the reason Discover
23 is the last entry is because they got in and found out they
24 could get no traction, because these rules stand in the way.
25 If these rules are changed in an appropriate way, differential

1 surcharging, unbundle pricing, forget surcharging,
2 discounting, if unbundled pricing is permitted -- and by the
3 way, if -- if we win our case, if the Department of Justice
4 wins theirs, they'll get part of it. If we win our case,
5 they'll get it all. And that means the watch word will be
6 differential pricing. And you won't be wondering whether it's
7 a surcharge or discounting.

8 Now, quickly, and the whole argument here about the
9 fact that this is what would happen, and all due respect to
10 Mr. Friedman, I'm not in any way belittling anything that he's
11 done. But he puts that example up there about the Discover
12 card. Your Honor, Mr. Shinder is right, you can do that
13 today. That's not -- that's not at the point of sale. That's
14 not -- that's not communicating the price directly, and so it
15 supplies no additional value at all. But the whole point is
16 that the marketplace should decide all of this and the
17 marketplace -- once again, when I was trying to back you away
18 from how do you surcharge, how do you do this, these merchants
19 already have all types of different plans. For example, the
20 grocery store, Kroger, or any particular --

21 THE COURT: A&P.

22 MR. ARNOLD: A&P, if they -- if they choose, they
23 have rewards programs, they give you extra things if you buy
24 there and everything. If you are free to price unbundle, then
25 they are free to say, all right, if you have -- if you get gas

1 points here, if you do this, we'll give you double gas points
2 if you use a Discover card, because they give us a cheaper
3 price. We give you no gas points if you use an American
4 Express, because it's too expensive for us. No one gets
5 offended over that, it communicates the -- is that a discount
6 or a surcharge? That's why you don't need to dance on the
7 head of that needle. Basically it's an unbundled price and
8 that's why all the central market planners that everybody
9 volunteered, all the critics are saying, well, merchants won't
10 do this, merchants won't do that. The truth is, if you stop
11 interfering with horizontal price competition, if you stop
12 interfering with that, merchants will figure it out and they
13 won't be dumb enough to walk out and say, Hey, give me
14 2 percent. They don't want to offend anybody. What they will
15 do is come up with creative ways to use all of their marketing
16 tools to encourage the use of certain cards, discourage the
17 use of others. And as we know, if you do that the prices will
18 come down, including American Express' price.

19 Now, your Honor, and I -- and this is when I was
20 talking about the strength of the case. Your Honor basically
21 has ruled in the Department of Justice case, that if, if
22 plaintiffs can prove an actual effect on competition, there's
23 no requirement to prove more than that, to prove the first
24 part of this case. And I submit, American Express, and
25 virtually everyone has admitted that's proven. The issue here

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1 is American Express has put out what I call a bogus defense,
2 it really is.

3 Now, since I crossed the Brooklyn bridge I snapped a
4 photograph of this, just so I could make this point.

5 The United State Supreme Court has made it clear as
6 it can possibly be that you cannot defend, cannot defend an
7 anticompetitive practice by saying it's not reasonable for
8 people to compete. And of course the similar case on that is
9 the National Society of Professional Engineers. And the
10 reason I put the Brooklyn Bridge up there is because that was
11 about bridge building.

12 They offered up that they had to fix prices on
13 engineering services because bridges would fall. Things would
14 happen terribly. And the Supreme Court says, that's for other
15 areas. It's not for the law of competition. You cannot
16 justify highjacking the law of competition for some good
17 purpose. And what American Express really is telling you is,
18 they've said it here, they've said it in our case, they say if
19 we -- if we are forced to compete, horrible things could
20 happen. We could be off -- we cannot be in here giving Visa
21 and MasterCard their -- the competition that we give now. It
22 could be a terrible thing to happen.

23 Well, the fact is the market decides that. And if,
24 you know, if the Supreme Court says that the Brooklyn Bridge
25 or any other bridge in America could collapse because of price

1 competition, but that's not the antitrust law's concern, it's
2 for other things, they certainly aren't going to worry about
3 the fact that American Express doesn't like the way it affects
4 their business model.

5 And so their defense is simply it's an insufficient
6 defense and they have attempted to hide it in what I call the
7 two-sided market fallacy. They have attempted to say that
8 because it's a two-sided market you can't measure this
9 anticompetitive horizontal price fixing thing that they've put
10 together here, this inhibitor of price competition which they
11 can't avoid so they have to admit it, so they came up with
12 something else. They came up with the same thing that Visa
13 and MasterCard offered up until they gave up. And that is
14 that you look at the issuing side and you look at the other
15 side, the network side, and you put them together and you look
16 at that effect, and it all sounds nice. There's just two
17 problems with it: One, no court has ever accepted that as a
18 measure of the way you do it, and you will never find one that
19 will.

20 Secondly, this is just an economic theory, but more
21 importantly, your Honor, they don't do it. They do not do it.
22 Their testimony, and I've put this up, Ms. Langwith, who is
23 the vice-president for pricing of merchant services in
24 America. And her definition in our case, basically in the
25 classes case, she gave the testimony that this is significant,

1 *In the pricing group, do you receive any data from the cost of*
2 *American Express' loyalty program?*

3 *She says, No, that would not be something that we*
4 *would typically see or have data on. I mean, those are costs*
5 *that are part of the issuer's side of American Express. So we*
6 *don't -- they don't usually look at our costs, and we don't*
7 *usually look at their costs.*

8 *They can tell you about two-sided markets but they*
9 *don't operate their business that way. They do not do it.*
10 *And the question was, Are those costs relative to how you set*
11 *your prices to merchants?*

12 *We don't really set our prices to merchants based on*
13 *cost. So -- we set our price based on the value that we*
14 *deliver to merchants, by industry, by merchant size. So the*
15 *cost is not a factor in that.*

16 *Once again, a confession of the monopolist, they*
17 *didn't have to pay attention to the cost, but more importantly*
18 *a confession that the two-sided market theory is a fallacy.*
19 *Not only does the law recognize it, but American Express*
20 *doesn't do it, your Honor. And Discover's president, again,*
21 *he's talking about basically the same stuff, about whether*
22 *there's a two-sided market operation here. Is there -- do the*
23 *rewards cause them to do that. And the answer is no. There's*
24 *no problem with being able to do this. If they compete, they*
25 *can still do it because they make money on that side of the*

1 marketplace.

2 I'll get now to the settlement itself.

3 THE COURT: How much time do you have?

4 MR. ARNOLD: Well, actually you started the clock,
5 the two questions, I don't -- see, I told you wanted to keep
6 that chest clock myself.

7 THE COURT: Go ahead and let's see how far you go.

8 MR. ARNOLD: As you know, obviously everyone is
9 reminding you of what Professor Hemphill said, that the
10 probability is effectively small or zero, and he's talking
11 about the parity surcharging. He also said that he can't see
12 how there's a mechanism to lower prices using parity
13 surcharging. And he's 100 percent correct on that. That's
14 why every major network in America is saying don't do this.
15 By the way, you had a couple of people here talking about
16 surcharging.

17 We're not -- we brought this case and fought to get
18 that very right and that's what we're here to do. But it's
19 not the right to charge 2 percent, it is the right to unbundle
20 pricing, and that's what we're here fighting for and that's
21 what we're trying to get done. And as Professor Hemphill
22 says, there is a mechanism in that to get the price done.

23 Now, this is -- he got this -- this is a very
24 interesting thing. He says that this actually creates the
25 interest we're talking about, where a group of investors are

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1 going to come in and start a credit card company. The court's
2 expert says that won't happen because -- with this relief --
3 because parity surcharge preserves the inability to reward new
4 or lower priced networks.

5 So if you can't come in and get market shares,
6 there's no reason to investment your money. This time
7 American Express docked, instead of investing somewhere else.
8 And that's basically why you're not going to get entry and the
9 antitrust laws want to encourage that.

10 Now --

11 THE COURT: Want to encourage what?

12 MR. ARNOLD: To encourage entry, encourage price
13 competition, and lower -- and if there's -- the way you hold
14 people who say that they have value in their product and
15 therefore people will pay more for it. The way you hold them
16 accountable is hold them to horizontal price competition. And
17 if, in fact, they're right, then their market share will say
18 it's exactly as they were. If they are, in fact, incorrect,
19 they'll lose market share and the market decides that, no
20 central planners of any type have to give you a set of rules
21 about how that's going to work. The market will decide that.

22 Now, I want to try to skip ahead in just a moment.
23 Here, I'll be the -- I guess Mr. Friedman and I agreed on this
24 completely. American Express is a good laboratory for looking
25 at this case, for the part you're being asked to look at. And

1 American Express agrees with this too. And the reason I say
2 American Express agrees with us, is we have the documents
3 American Express.

4 Now, I'm not putting their documents up on the
5 screen, your Honor, because they're under protective order,
6 they're in your folder but I'm going to refer to a couple of
7 them in general terms. I'm not going to put them up for
8 general publication. But the fact is that when American
9 Express's attorneys were trying to talk to the Department of
10 Justice from bringing the law suit, they basically said
11 American Express's experience in Australia, confirms that a
12 significant number of card members who are exposed to
13 differential surcharging shift their purchases to other
14 payment method. The documents that we have here reference to
15 them. Every one of them shows you that in their planning for
16 the United States of America, not Australia, they're planning
17 here, they relied upon, studied, and analyzed the appearance
18 in Australia and they concluded there that differential
19 surcharging was a risk.

20 They basically, if you read those reports closely,
21 you'll see that they say their plan is not to treat parity
22 surcharges any different than companies that don't surcharge.
23 It's the differential surgeries that they're trying to stop.
24 Because they recognize parity surcharging they can get away
25 with it, because they can keep going up, claim they got better

1 value, and they can keep raising the price. There's no
2 pressure to put it back down.

3 Now, the other documents that I didn't want to put
4 up, but I put it in your folder, have to do with the fact that
5 American Express knows parity surcharging has no effect.
6 Those documents, look at the notes in there. They're not
7 afraid of parity surcharging. They would agree to this, I
8 believe, that this is a -- this is a classic brown pass here.
9 You know, throw me in here and make me have to do parity
10 surcharging. I swear I don't want that to happen, yet their
11 only internal document say they don't really care.

12 So this victim session, they're talking about how
13 they've made this adjustment in their business plan. This is
14 it called -- this is a qualified slight retreat that actually
15 is through the excellent lawyers, no one ever accused them of
16 not having great lawyers -- and they do have them sitting
17 right there. And they have come up with a clever strategy to
18 actually -- that's right, they are -- clever strategy to
19 actually make -- take what is an impending defeat.

20 Because this -- they will never -- this two-market
21 fallacy will never -- I don't think it'll withstand this
22 scrutiny, part of it will not withstand the scrutiny of the
23 Second Circuit. So they virtually admitted that they have
24 rules that interfere with horizontal price competition that
25 they got this excuse that they basically call it the two-sided

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1 market. No court is going to let them get away with that. So
2 this is an attempt to try to pull this thing -- basically,
3 pull it out of the hat.

4 Now, I want this one quick moment because I'm
5 actually going to finish, I think. Now, American Express has
6 offered up the other thing, this horrible thing that could
7 happen, what I would call a highly dramatic presentation that
8 they would go out of business if this thing -- if you actually
9 rule against them, that they would be threatened.

10 THE COURT: We're back on the Government's case now?

11 MR. ARNOLD: But it's part of the record here, your
12 Honor, that's what we're looking at.

13 THE COURT: Okay. I just want to make sure what
14 we're talking about here.

15 MR. ARNOLD: Okay.

16 THE COURT: We're not talking about the settlement,
17 we're talking about the --

18 MR. ARNOLD: That's right.

19 THE COURT: -- MDPs. The settlement has nothing to
20 do with the MDP.

21 MR. ARNOLD: Well, the settlement doesn't the way
22 it's set up, that's just the way it's structured.

23 THE COURT: Okay, go ahead.

24 MR. ARNOLD: But my point is that's why they would
25 agree to something like this, so that they can avoid being in

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1 jeopardy for those things that they are attempting to
2 underscore their entire defense of this two-sided market by
3 saying something horrible is going to happen to American
4 Express if it doesn't happen. It didn't happen.

5 Well, you know, Mr. Chenault is one of the top
6 executives in America, and he's looking after his company the
7 way he felt he should, and he's being paid to do. But when
8 he's talking to investors, you Honor, he never once ever
9 suggested -- in fact, he says the experience in Australia is
10 they're doing great. Both parts are doing great, not just the
11 part he's suggesting here, about the bank, their proprietary
12 business is doing great and their financial statements look
13 like they are doing great, and it sounds like he's being
14 accurate, in not being dramatic with them and maybe a little
15 more dramatic here.

16 The last part of this was that in our case Professor
17 Stiglitz was asked, you realize American Express could go out
18 of business if, in fact, differential surcharge becomes part
19 of this? And he was asked, do you think that would be a good
20 idea, less competition?

21 And they asked him three times. He kept qualifying
22 it by saying he thought the best thing to do was for American
23 Express to change their rules and become a viable competitor
24 here and help introduce price competition in the case. But
25 after being pressed three or four times, he basically said

1 that the choice -- if the choice is between American Express
2 remaining in business with -- with that rule in place, which
3 prevents all other price -- horizontal price competition from
4 being removed, that the price competition would be better,
5 because they're the only reason this competition is not taking
6 place today.

7 Now, having -- so I will end on a way that gives --
8 that fits what I was supposed -- I kind of got excited about
9 the merits of the case, your Honor, and I apologize for that.
10 But this one little isolated part --

11 THE COURT: You couldn't say a word for seven weeks.
12 I'm sure that was difficult.

13 MR. ARNOLD: It was difficult. I asked Todd for
14 time two or three times back there.

15 THE COURT: I'm sure.

16 MR. ARNOLD: Is that American Express has created in
17 this very document, not only do they never have to commit to
18 changing these rules until all the appeals are run, but
19 secondly, they have an escape clause in here that they agree
20 not to terminate merchants solely for surcharges, but they
21 didn't commit not to terminate them for surcharging as one of
22 a group of causes. And the simple thing in having watched
23 what they did in Australia, a simple scenario is this: They
24 simply told merchants that aren't growing market share and
25 they said, you know, you are on a list now that can't -- that

1 just -- you're marginal, whether we're going to keep you or
2 not, you're not market share. By the way, you all happen to
3 be the people that are surcharging. We're going to exercise
4 our rights and not do business with you and terminate you.
5 And because they could establish, real easy records to
6 establish, you could selectively send out messages like that,
7 is not solely for surcharging and they could terminate them.

8 THE COURT: How does that square with the
9 presentation that American Express made in the Government's
10 case that -- that they are at a competitive disadvantage with
11 Visa and MasterCard and the proof of that is that so many
12 fewer merchants accepting American Express cards because of
13 the perception that the discount rate is higher for American
14 Express merchants, some merchants simply will not accept the
15 card because of the higher discount rate.

16 MR. ARNOLD: That's the classic case we heard in law
17 school, when someone basically murders their parents and then
18 ask for mercy because they're an orphan. They basically --
19 they basically are saying, our prices are so high that we're
20 at a competitive disadvantage on merchants that don't feel the
21 market power and compunction.

22 This is a very interesting point. We went through
23 this for a number of years. In both cases, your case and
24 Judge Gleeson's case, and in both cases what happens here is
25 that their market power is directly tied, maintained by their

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1 rules, but they have to get in the door first. And you'll see
2 actually in one of those documents where they went to a small
3 merchant fee appoint -- I can't say that -- a small merchant
4 fee, a very small amount. And then once they got the
5 merchants, they jumped it back up, almost doubled the price.

6 And of course they didn't lose a lot of those
7 merchants. Because once they get in, and insistence starts
8 inside the thing, then they can't drop it. So the answer is
9 that their claim that -- that they're at a competitive
10 disadvantage is one of their own making, if they are. Because
11 they certainly can get into as many merchants as they want to.

12 Now, American Express also is taking advantage of
13 another -- of another phenomena of their. And this is all due
14 respect to them, because they know they were very snobby. At
15 one time, when I was a young lawyer, I couldn't get an
16 American Express card. Because they were kind of snobby. You
17 know, you had to really have a good income --

18 THE COURT: Do you have one now?

19 MR. ARNOLD: I do. The reason is, they've lowered
20 their standard. They have lowered their standard. They
21 lowered from the merchants that they go to and they lowered it
22 for the people that they allow to get an American Express.

23 THE COURT: If you keep this up, you'll be getting a
24 cancelation.

25 MR. ARNOLD: I've been expecting one for years.

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1 But, any way, the answer is, they're not at a competitive
2 disadvantage. They've chosen to position themselves in the
3 market that way. That's what they've done.

4 THE COURT: Do you think there's -- you started off
5 by mentioning that Judge Gleeson on repeated occasions said
6 that the contours of the Visa-MasterCard case, were that it
7 was an antitrust case.

8 MR. ARNOLD: That's correct.

9 THE COURT: All right. Is there any allusion in
10 this case, that it's anything other than an antitrust case?

11 MR. ARNOLD: No, your Honor, there isn't. And
12 that's why all of the merchants here that opposed it are all
13 united, that this thing doesn't work, and the criticisms are
14 fairly consistent. If you had attended that hearing it was --
15 it was more of a three-ring circus. People were up with every
16 type of complaint possible, including don't approve this
17 because Congress will never regulate rates if you do, all
18 those types of things.

19 And Judge Gleeson would continue to repeat, that's
20 not our issue. I can't do that. I'm only here for this. And
21 a lot of fairly influential merchants who -- because they had
22 been involved in the lobbying efforts to Congress to try to
23 get regulation, and they were really seriously believing that
24 might impair their ability to go to Congress and say, look at
25 these rates, you should regulate them.

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1 And that's -- so the answer is, he repeated that
2 because of that issue. That's not the issue here except, as I
3 said earlier, antitrust case -- no more, no less.
4 Unfortunately, this is way less than what the strength of
5 that -- and I'll remind -- my number four here, that is
6 Grinnell, element number four, the strength of the case, this
7 is a powerful case. And, your Honor, I thank you for your
8 patience.

9 THE COURT: I just have one more question. Does the
10 existence of the Durbin Amendment have any effect or influence
11 on this situation involving the class settlement?

12 MR. ARNOLD: No, it does not, your Honor. The
13 Durbin Amendment, that's not absolutely correct. Because the
14 Durbin Amendment had some merchants, the smaller merchants,
15 lower their rates. Now for some larger merchants, like most
16 of the people here, their debit rate actually went up, because
17 of the way when it got regulated.

18 But to the extent it made debit cards something to
19 steer to, that's -- it has some minor impact but it's not
20 debit card steering, that's the critical issue here, it is the
21 steering between these credit card companies. Since you asked
22 that, I was going to -- I was almost going to say something
23 about Mr. Korologous' argument about, that we had based our
24 whole case, our damages on the debit card issue. I started to
25 say something, and Mr. Almon back there said don't get

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1 distracted, get up and talk about what you want to talk about.

2 But the fact is that it was misleading about what he said.

3 It is true, our expert used debit, as a define to
4 try to figure out what a but for price would be. He wasn't
5 saying that that was -- that that is what -- that the -- that
6 that was the competition. He was saying that's the only -- in
7 this payment system, that's the only competitive price I can
8 find. So I used that and built it backwards and things that
9 are peculiar to credit cards, that's what the price ought to
10 be. Thank you, your Honor.

11 THE COURT: Thank you.

12 MR. ARNOLD: I appreciate it.

13 THE COURT: All right. Why don't we take lunch
14 until 2:30 and then we'll move on with the next speaker.
15 Thank you.

16 (Luncheon recess.)

17 (Continued on the next page.)

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Mr. Feinberg

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A F T E R N O O N S E S S I O N

2:30 P.M.

(In open court.)

THE COURT: All right, before we proceed, let me just mention that one of my new law clerks is a former associate of Cravath, Swaine & Moore, but is in no way involved in dealing with this litigation in chambers. So I just wanted to mention that and put it right on the record.

Okay, the next group is Blue Cross and Blue Shield health insurers, objectors. Mr. Feinberg.

MR. FEINBERG: Thank you, your Honor. Good afternoon. Adam Feinberg on behalf of several dozen Blue Cross and Blue Shield health insurers, and the entities that own them and some of their affiliate entities.

And I thought, your Honor, I would start by explaining just a little bit about who we are. As you may or may not know, Blue Cross and Blue Shield Association licenses out to different health insurers across the country, the right to use the Blue Cross and Blue Shield trademarks. And the clients that I represent are the licensees of those trademarks in almost all of the states across the nation as well as some health insurers that are owned by the same companies that own these Blue Cross entities that also have non-Blue Cross branded business. But Blue Cross in and of itself, Blue Cross branded business covers about one in three Americans. So the

1 group of health insurers that I represent is an enormous
2 portion of the health insurance business in the United States.

3 And I think it's fair to say that American Express
4 probably has no idea how the health insurance industry works
5 and I know that the class representative, class
6 representatives have no idea how the health insurance industry
7 works, and that is precisely why they make a very bad set of
8 representatives at least as it relates to negotiating a
9 settlement that would bind health insurers.

10 So what I would like to do, your Honor, is just
11 explain a little bit about the market in which health insurers
12 operate and particularly with the market that exists starting
13 essentially as of the beginning of this year with the
14 effectiveness of most of the important parts of the Affordable
15 Care Act.

16 So the Affordable Care Act, amongst other things,
17 created health insurance exchanges, these are electronic
18 marketplaces that you probably are familiar with, on which
19 insurance companies sell and compete for business in the
20 individual and soon to be small market business. There are
21 currently millions of individuals in the United States who
22 purchase health insurance through this market and it's
23 estimated by the federal government that that number will run
24 in the tens of millions in the next few years.

25 And these healthcare exchanges, these internet-based

1 healthcare exchanges can be run either by a state, if it
2 elects to do so, or by the federal government if the state
3 doesn't do it itself. And as you may also be familiar with,
4 your Honor, more and more states are opting not to do it
5 themselves and are leaving that job to the federal government.

6 And when the federal government operates one of
7 these exchanges, they require health insurers to enter into a
8 written agreement and they impose a whole source or a whole
9 set of rules and regulations on such health insurers. And
10 there is one such rule that is particularly important in this
11 case. It expressly outlaws the use of surcharging or even
12 discounting.

13 I know you and Mr. Arnold were engaging in a back
14 and forth about whether or not there is a difference between
15 those two things, but for our purposes it doesn't matter.
16 Both of them are expressly prohibited by the Department of
17 Health and Human Services when you are selling products on
18 federally run healthcare exchanges.

19 So for example, one of my clients is Blue Cross and
20 Blue Shield of Louisiana. They operate in a state that has a
21 healthcare exchange run by the federal government. They
22 simply cannot surcharge or discount for that matter. In all
23 of their business sold on the internet-based marketplace that
24 was created by the Affordable Care Act.

25 In addition to that, the Affordable Care Act creates

Mr. Feinberg

1 rules that are known as the MLR, or medical loss ratio. And
2 these are essentially pricing regulations that say that health
3 insurer must spend, in the individual market at least and in
4 the small business, in the small employer market, must spend
5 80 percent of all of the revenue they receive with a certain
6 very limited exception on healthcare-related expenses. That's
7 mostly doctors visits, wellness programs and things like that.

8 The other 20 percent is allowed to go to profit and
9 all of their administrative expenses. And in that category
10 would be the discount rates or discount charges that are
11 charged by American Express and that we're here today to talk
12 about.

13 And so if you take a discount rate that's whatever
14 it may be for a particular merchant but roughly 2 percent,
15 let's say, that is a huge portion of the 20 percent that a
16 health insurer has to cover all of its administrative expenses
17 and profit. And we put a couple of declarations in the
18 record. The health insurers that I represent are all over the
19 map. Some of them do not meet this threshold. And so if they
20 are charged a discount rate they cannot pass that on to their
21 customers in any way, shape or form. They can't raise their
22 prices, they can't surcharge, because if they do, they end up
23 giving 80 percent of it right back to the consumer via a
24 rebate that is required by the Affordable Care Act if you do
25 not meet the 80 percent MLR threshold. And that MLR group

1 applies to all of the business, not just the business that is
2 sold on the internet-based exchanges that I talked about
3 previously.

4 And so while most of the reasons that health
5 insurers have for accepting credit cards relate to the
6 exchanges that are created by the Affordable Care Act. In
7 fact, I think every one of the declarations that we put in
8 notes that these Blue Cross entities firmly believe that
9 simply cannot sell on an internet-based marketplace unless you
10 take credit cards. I think that's sort of an obvious point.
11 But that is where most of their credit card transactions are
12 likely to occur.

13 But even aside from that fact, aside from that
14 marketplace where the rule says if it's run by the federal
15 government they cannot surcharge, totally aside from that, we
16 have these MLR rules which effectively limit, if not
17 eliminate, the ability of a health insurer to surcharge or
18 view any other mechanism for that matter to pass on the cost
19 discount charges to its customers.

20 And there is one other element of this regulatory
21 backdrop that I think is important here. And that is the
22 timing. So all of this came into being for calendar year 2014
23 in terms of these exchanges, and you could enroll as early as
24 October of last year but that was the beginning, that was the
25 first time that any health insurer was selling on the

1 internet. And for many health insurers, that was the first
2 time they were accepting credit cards. And so we have some
3 examples of insurers who put declarations in the record that
4 say they actually right now take American Express.

5 But I think it's important to note that a good many
6 of the Blue Cross and Blue Shield health insurers do not take
7 American Express, they are still trying to figure out what the
8 credit card business is all about and whether they want to
9 take credit cards at all; and, if so, which ones do they want
10 to take.

11 And so some of these companies, while they're very
12 likely to take credit cards in the future, do not take them
13 right now but they would still be covered by the class
14 definition to the extent that it covers merchants who accept
15 American Express in the future.

16 And I'm not going to get into the due process
17 arguments. I know some of the other objectors are going to
18 get into that, but some of my clients are the classic examples
19 of the so-called future draft picks that you mentioned before.
20 They did not get any notice that this case was going on. They
21 got no notice of the post settlement. They happen to be here
22 now because they heard about it from some of their brother and
23 sister Blue Cross entities across the county who did take
24 American Express and did get the memo. How many other
25 entities out there didn't any such notice and didn't find out

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1 about this otherwise, of course, who knows.

2 But at the end of the day, the Blue Cross and Blue
3 Shield entities believe that the settlement should be rejected
4 for a whole host of reasons, all -- well, I should say most
5 which relate to the fact that they simply get little, if any
6 benefit out of this settlement.

7 We completely agree with the objectors that you
8 heard previously that the value of this settlement is
9 extremely low in that parity surcharging isn't going to do any
10 good. But whatever small value that might have had for the
11 average merchant, it's substantially less, if anything, for
12 health insurers, for the reasons I said previously. They
13 simply cannot surcharge if they're selling at least on these
14 internet-based exchanges. And even when they're selling at
15 other marketplaces, they are bound by these MLR rules which
16 prohibit them from -- at least if they're at or above the
17 80 percent threshold which prohibit them from passing on the
18 cost.

19 And so they look at the settlement and say I'm
20 getting nothing and they want no part of it. You had asked
21 before, well, wouldn't an entity at least get temporarily some
22 benefit out of parity surcharging while courts of appeals were
23 sorting this all out. Well, in our view, it's not worth the
24 release they have to give. They get so little, if anything,
25 out of it, the deal is simply bad. And it's not as compared

1 to what they might get in a lawsuit, they're not parties in
2 any pending lawsuit, unlike some of the other objectors, they
3 don't want anything to happen. They just don't want to be
4 bound by the settlement that's being proposed in this case.

5 And I just give you a complete hypothetical example.
6 But some of the rules that are included in the release in this
7 case relate to the honor all card rules. There's no real
8 relief that's given with respect to that. But hypothetically
9 if the Blue Cross entities cared only about the honor all card
10 rules and didn't care anything about the surcharging rules
11 because they are of no moment to them as they are prohibited
12 by other laws and regulations from surcharging, this case is a
13 disaster for them. They get zero relief in terms of the honor
14 all card rules but they're giving a release that prohibits
15 them from suing both for injunctive relief and for damages on
16 some other element of the rules that American Express has in
17 place in exchange for literally nothing of value. And that
18 simply isn't fair.

19 And I know some of the objectors in the past had
20 already covered some of the legal bases but we believe that
21 the different situation that health insurers find themselves
22 in means that the typicality and commonality requirements of
23 Rule 23(a)(2) and (3) are simply not met and also that the
24 unity required by Rule 23(b)(2) is not met, and likewise that
25 there's no fair, reasonable and adequate settlement as

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1 required by Rule 23(e) (2) .

2 This is simply a terrible deal for health insurers
3 and they don't want any part of it and they don't believe that
4 it is fair given that there's no value to them in it. Thank
5 you, your Honor.

6 THE COURT: Thank you. All right, the next objector
7 is Buckeye Institute for Public Policy Solutions.
8 Mr. Schulman.

9 MR. SCHULMAN: Good afternoon, your Honor.

10 THE COURT: Good afternoon.

11 MR. SCHULMAN: Adam Schulman for the Buckeye
12 Institute for Public Policy Solutions. Some objectors who
13 have previously spoken have addressed the merits of the
14 underlying litigation vis-a-vis the proposed settlement.
15 That's the Grinnell factor for, and that's an objection to the
16 adequacy of the settlement. It's a valid objection but it's
17 only one part of the inquiry that this court's obligated to
18 make. I'd like to put aside for the moment the substantive
19 antitrust merits of the litigation and address where this
20 settlement really falls short in our view. Its failure to
21 comply with many of Rule 23 structural safeguards.

22 First, the proposed certification. As we've heard
23 from other objectors, the (b) (2) certification is untenable.
24 The settling parties maintain that a (b) (2) certification is
25 proper because of what the settlement obtains, unitary

1 injunctive relief.

2 Other objectors dispute the premise that the relief
3 obtained really is actually indivisible. And I think the
4 other objectors have the better of that argument. But
5 importantly, the point I want to make is the entire
6 disagreement is besides the point. Wal-Mart v. Dukes cannot
7 be read to say that any (b)(2) certification goes if the
8 plaintiffs obtain indivisible injunctive relief. Rather,
9 while it is one necessary precondition of a (b)(2) class, it
10 is not the only precondition.

11 Dukes expressed concerns about preclusion of absent
12 class members' damages claims. The language that Dukes used
13 was by litigation that they had no power to hold themselves
14 apart from; that is to say, the release of the settlement
15 matters. (b)(2) settlements are only allowed to release
16 injunctive claims. Here the settlement extinguishes all
17 damages claims, future damages claims until the release
18 termination date, and even currently existing monetary claims
19 for disgorgement or restitution, that is nonlegal monetary
20 claims.

21 What is more, if the plaintiffs are correct that all
22 that is necessary is obtaining injunctive relief within the
23 Second Circuit was wrong in Hecht v. United Collection Bureau,
24 a case that postdated Dukes. In that case, that was a Fair
25 Debt Collection Practices Act case where their relief obtained

1 was in agreement of the defendant not to make violating calls
2 any longer. But the court said you had to look at more than
3 just the relief obtained, you had to look at the settlement
4 class, you had to look at the settlement release itself.

5 Now, the plaintiffs seek to have this court reimpose
6 exactly what Dukes repudiated, the subjective standard based
7 on whether the named plaintiffs and class counsel think that
8 injunctive relief is important. If Dukes did one thing, it
9 would reject that very standard for (b)(2) certification.

10 Buckeye's second objection to certification is that
11 the settlement class, as defined, is unascertainable. This is
12 the future draft picks issue in our view, because the class
13 includes all persons who in the future accept AmEx branded
14 cards even if they don't accept such cards now.

15 Futures classes are unacceptable because they
16 deprive individuals of their right to notice an objection,
17 both rights guaranteed under Rule 23(e). Both the Supreme
18 Court and the Second Circuit, as well as numerous district
19 courts, have suggested that such an open-ended class
20 definition is unacceptable.

21 The plaintiffs and Mr. Korologous's response today
22 is to say that future merchants receive exactly the same
23 benefits as current members of the class. First of all, I
24 don't agree that's correct. A hypothetical individual who
25 starts accepting cards in five years doesn't get the same

1 indivisible relief, they only get five years. But if they
2 don't get to ten years, the settlement assures.

3 THE COURT: Well, but the relief doesn't have to be
4 identical for it to be lawful. In other words, it could be
5 that one company gets more benefit than another company from
6 the relief. But if the relief is lawful and appropriate, then
7 they get as much relief as their circumstances permit.

8 THE JUROR: Well, I think (b)(2) requires more than
9 just being lawful and appropriate. I think it requires more
10 indivisibility than that. But even if --

11 THE COURT: On your theory you could never have a
12 settlement that envisioned that --

13 MR. SCHULMAN: People coming into the class later.

14 THE COURT: People coming into the class later. Is
15 that the law?

16 MR. SCHULMAN: I believe that that would be the law.
17 I think, if you look at Amchem, it said that the concern of
18 futures classes, it raises -- that they recognized the gravity
19 of the question, they rejected the settlement on other
20 grounds. But I think that if they had reached the question,
21 they would have said that that's the law, and it hasn't been
22 teed up.

23 And the Second Circuit said something similar in I
24 think Stephenson versus Dow Chemical. But even if you viewed
25 that as indivisible relief and the future class members are

1 receiving the same as current class members, that's not
2 relevant. What's relevant is that they never received notice,
3 they never received an opportunity to object. And Buckeye has
4 the right not to have its claim the way this part of a class
5 that's overbroad and unascertainable like that.

6 Now I'd like to discuss the fairness of the
7 settlement terms for a moment. There are two overarching
8 components of this settlement in our view. There's a cash
9 component of just over \$75 million. As we note from In Re Dry
10 Max Pampers and a variety of other cases cited in our
11 objection, this is a real component of the settlement even
12 though it's formally segregated from class relief. It's a
13 component that the defendants were willing to put on the
14 table. Nearly 100 percent of this component is going to class
15 counsel and the named representatives.

16 Then there is the injunctive component. American
17 Express will amend its standard contract to permit parity
18 surcharging for at least ten years following the effective
19 date. Professor Hemphill has concluded, of course, that the
20 value of this proposed relief is highly uncertain with a
21 substantial probability that its effect will be small or zero.

22 So that's the potential upside, but there's another
23 half of the equation that needs to be considered, the
24 potential downside for class members. That is more
25 specifically the concessions that the settlement makes on

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1 behalf of those class members in waiving their rights to
2 assert antitrust claims after the provisions change date until
3 the settlement release as long as American Express abides by
4 its obligations to comply with the injunctive terms of the
5 agreement.

6 With this future looking release, it's no mystery
7 why American Express is advocating so vociferously for the
8 settlement. Whatever benefit there exists in American
9 Express's agreement to allow parity surcharging is more than
10 offset by the concessions that the parties seek to have the
11 court memorialize. For good reason, the law doesn't authorize
12 class action attorneys to impose these future costs on absent
13 class members, especially on class members who are not even
14 permitted to opt out of the agreement.

15 The law doesn't allow the parties to overwrite the
16 statutory text of the Sherman Act and bind absent class
17 members to the parties' conception of what the scheme should
18 look like. But it's even worse to pretend when valuing the
19 settlement that these costs and concessions are not part of
20 the arrangement when they clearly are.

21 I've reviewed and scrutinized hundreds of
22 settlements and I cannot recall any other settlement where a
23 full 18 paragraphs of the agreement and many more subsections
24 are devoted to detailing the class's release. Detail itself
25 is commendable but the number of paragraphs here only lets us

1 know how enormous the scope of the release is. It does little
2 to clarify what is and what is not release.

3 We can't know how great these costs imposed by the
4 release will be, because no one knows what the relevant market
5 will look like in five or ten years and whether the
6 contractual scheme imposed by this settlement will comply with
7 the antitrust laws in that context.

8 If American Express's release from large scale
9 liability based on future conduct, it's entirely possible that
10 this is a negative value settlement for class members. Such
11 settlements are prohibited by the Class Action Fairness Act,
12 specifically by 28 U.S.C. Section 1713.

13 Another problem with the prospective release of
14 claims is that fundamentally American Express is in the
15 driver's seat. Because of the nature of private enterprise,
16 American Express dictates its future course of conduct. So
17 prospective agreements that waive future claims are tantamount
18 to a game of chess where the defendant is always playing as
19 white. For example, the release includes, quote, the future
20 effect in the United States of the continued imposition or of
21 adherence to any rule or provision identified above, any rule
22 or provision as modified by this class settlement agreement,
23 and any rule or provision that is substantially similar.

24 Now, what does that say about the situation where
25 American Express continues to adhere the requirements of

1 Paragraph 8 of the settlement agreement but adds in some new
2 term into the merchants' contracts that may violate the law?

3 What does it say about how to interpret whether a
4 modification goes beyond being --

5 THE COURT: Slow down.

6 MR. SCHULMAN: I'm sorry, I'm trying to get
7 everything in.

8 THE COURT: Well, if you go a little over and you
9 still have something to say, I'll let you say it.

10 MR. SCHULMAN: Okay.

11 THE COURT: No reason to race through it because I
12 have to be able to absorb it.

13 MR. SCHULMAN: Good point.

14 THE COURT: And the court reporter has to be able to
15 memorialize it, which you would like of course.

16 MR. SCHULMAN: Good point, your Honor.

17 THE COURT: Go ahead.

18 MR. SCHULMAN: So what -- the agreement doesn't say
19 anything about what is substantially similar or not. What is
20 clear is that American Express is in the driver's seat.

21 To put this another way, the terms of the
22 prospective agreement are way overreaching by releasing future
23 conduct class members' claims that the parties have no right
24 to release and at the same time not detailed enough by
25 preventing wiggle room that could prevent the class from

1 obtaining any benefit of the bargain.

2 I don't say this to impugn the competence of the
3 attorneys for the settling parties in ironing out the
4 particular terms. I'd rather -- what I mean to say is that
5 the error was in even trying to come to this type of future
6 looking agreement in the first place. This is not the type of
7 agreement fit for settlement of a class action lawsuit pending
8 before an Article III tribunal. It's more like a consent
9 decree that the DOJ or FCC might reach in an enforcement
10 action. I strongly the court to look at Judge Chin's decision
11 in Authors Guild v. Google, a 2011 settlement rejection out of
12 the Southern District.

13 Fundamentally, there is a misconception of the role
14 of class counsel that is present. Class counsel are
15 fiduciaries and trustees for the absent class members. Class
16 counsel are not mediators of a prospective business
17 arrangement between absent class members and the defendants
18 for which they'll entitle themselves to a 75 million-dollar
19 brokerage fee.

20 The settling parties have stressed the importance of
21 compromise and there's something to that notion. But a valid
22 compromise is arriving at some settlement between the amount
23 sought in the complaint, billions of dollars, and the amount
24 that would be received if the case was wholly unsuccessful,
25 zero dollars. Never, ever should the class be put at risk of

1 being worse off than they would be if the suit was never
2 filed. But here that's just what the release of future claims
3 does, it risks the class being put at a worse position than if
4 the suit was never filed in the first place.

5 Finally, I'd like to touch on the fee request in the
6 event the court is inclined to reach that question. For
7 multiple reasons, the request cannot be approved consistent
8 with Rule 23(h). Procedurally, the plaintiffs ask for a
9 lodestar-based award without the submission of billing records
10 Second Circuit law does not permit this. But now confronted
11 with this argument, the plaintiffs rationalize that this rule
12 only applies to contested fee shifting pursuant to civil
13 rights in labor laws, yet the class action subcontext is no
14 different. If anything, the scrutiny must be even more
15 vigorous.

16 Federal Rule of Civil Procedure 23(h) requires that
17 class members receive notice of the fee motion and an
18 opportunity to object to the same. The advisory committee
19 notes for 23(h) presuppose that there will be plenary
20 oversight by both class members and this court, yet class
21 counsel's argument is that they are permitted to conduct the
22 oversight themselves and then file a bare bones summary of
23 their work. That's wrong.

24 Class counsel has deprived everyone of the ability
25 to scrutinize their fee requests. And substantively the

1 75 million-dollar request is also untenable because it's
2 excessive. A 75 million-dollar fee award would be
3 commensurate with the demonstrated benefit of roughly
4 \$600 million, yet as Professor Hemphill makes clear, the
5 demonstrated benefit here is precisely nothing. And as I
6 mentioned earlier, the potential cost to absent class members
7 of the future looking release is great.

8 Class counsel has not cited any other settlement
9 that obtained only injunctive relief and where class counsel
10 was awarded \$75 million in fees because it's very likely that
11 none exists. The class benefit, or lack thereof, is relevant
12 even if the court had records sufficient to apply the lodestar
13 method. As the Ninth Circuit said recently in In Re HP Inkjet
14 Printer litigation, plaintiffs' attorneys don't get paid
15 simply for working, they get paid for obtaining results.
16 Appropriate use of the lodestar calibrates the award downward
17 where the degree of success is limited.

18 Here the plaintiffs seek their entire punitive
19 lodestar or close to it. Even though the class is being asked
20 to settle for no compensatory relief at all, they seek to use
21 their crude lodestar to insulate themselves from the risk of
22 pursuing an unprofitable case, something the court cannot and
23 should not do. I welcome any questions.

24 THE COURT: I would only mention that I think that
25 your analogy of a brokerage commission to legal fees doesn't

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1 appear to me to be necessarily appropriate where, you know,
2 brokerage fee is earned based on a contract where the result
3 will afford the brokerage fee whether the broker spent five
4 hours or 500 hours to bring the parties together.

5 Legal fees, as you pointed out, are subject to the
6 court's review of billing records and other appropriate
7 evidence of the work that was done and the nature of the work,
8 the benefit, and so on. So I'm not --

9 MR. SCHULMAN: I agree completely. That's my entire
10 point, is that they shouldn't be trying to act as a mediator.
11 They are just representing the plaintiffs. They're not
12 representing the plaintiffs and defendants trying to get them
13 to a settlement at any cost. That's exactly the point of what
14 I'm trying to get across, that they misperceived themselves.
15 They've abandoned the fiduciary role because of the
16 possibility that the settlement could be a negative value
17 settlement for certain class members or for the entire class.

18 THE COURT: You're saying they're fiduciary and
19 they're also an advocate at the same time?

20 MR. SCHULMAN: For the class. That's -- that's what
21 their role is supposed to be and they acted in this settlement
22 more like a mediator, that's our view. And that is not
23 appropriate.

24 THE COURT: And you would like to take the
25 settlement and ignore everything that came before the

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1 settlement, in other words, all the litigation that happened
2 before the settlement, and unsuccessful as it was in Italian
3 Colors, so you want to limit this to just the narrow scope of
4 the negotiations with American Express?

5 MR. SCHULMAN: No, no, no, that's not what I'm
6 saying. I'm not saying that they can't be compensated as
7 lodestar for that work that was put into the case.

8 THE COURT: Okay.

9 MR. SCHULMAN: What I'm saying is that their role is
10 not reaching settlement at all costs. If it risks a
11 potentially negative result for their clients. And that was
12 the -- that was the mistake of the settlement in our view.

13 THE COURT: Thank you.

14 Okay. The next speaker is John Pentz.

15 MR. PENTZ: Yes, your Honor. Good afternoon, John
16 Pentz on behalf of Unlimited Vacations, Lasko Enterprises and
17 The Silk House.

18 THE COURT: And Unlimited Vacations, do they have
19 any trade names or are they just Unlimited Vacations?

20 MR. PENTZ: They're just Unlimited Vacations, a
21 travel agency, your Honor.

22 THE COURT: Proceed, please.

23 MR. PENTZ: Well, WELL, there are plenty of reasons
24 not to approve this settlement today. As we heard this
25 morning, first of all you cannot use 23(b)(2) to release

1 future claims. Number two, the lead plaintiffs are neither
2 typical nor adequate to represent the absent class members
3 here. Class members -- number three, class members are
4 differently situated. And number four, as Professor Hemphill
5 has found, the proposed -- the only relief that could possibly
6 flow to the class is likely to have no value.

7 But the class counsel and American Express are
8 trying to trap you with a false choice. They say that unless
9 continued litigation in this case can produce a better result
10 than this settlement, you have to approve the settlement no
11 matter how little value anyone may find it might have.

12 Now, while that is typically true in a lot of
13 consumer cases that hit a brick wall, for example, another
14 circuit might issue a decision that guts the case and assures
15 a defendant a victory, at that point the parties may enter
16 into a settlement for coupons of dubious value, but the court
17 may nevertheless -- typically courts do approve those
18 settlements because they make a finding that the claims have
19 zero litigation value.

20 Now, those settlements are approved sometimes upheld
21 but they differ in two major respects from this settlement.
22 Number one, in those cases the only thing that's being
23 released are the claims that have already accrued and have
24 already been found to have zero litigation value. And number
25 two, those cases do not release claims that may accrue in the

1 future for future conduct and essentially tie the class's
2 hands to ever raise the same claims again. Essentially they
3 just wipe the slate clean and the class is free going forward
4 to bring the exact same claims.

5 Class counsel this morning raised the specter that
6 this case will go on for quite some time and may even work its
7 way back up to the Supreme Court again. Well, so what? Who
8 cares how long this case takes to eventually, you know, die
9 it's last whimper. That's not the comparison. The comparison
10 is what other class members can do in future arbitration and
11 future litigation. As we saw today, some of the objectors
12 ultimately after they go through mediation and arbitration
13 have a right to file a case in court. And it's those -- it's
14 that litigation to which this settlement has to be compared
15 not what happens to this case once your Honor rejects the
16 settlement, because I think everybody agrees, this case is as
17 Mr. Shinder called this morning, defunct.

18 Not every failed case has to end in a bad
19 settlement. And while typically it provides a way out for
20 both parties and it gives class counsel a little bit of
21 compensation for their failed efforts, this is a case where
22 what the parties proposed is much worse than that. I agree
23 with Mr. Shinder and with Mr. Schulman that this is a negative
24 value settlement. In other words, the class would be better
25 offer if this case had never been filed. They'd be better off

1 with the possibility, the threat that they can still bring an
2 antitrust class action for the practices of not permitting
3 differential surcharges.

4 With respect to the fees, I take a little bit of a
5 different approach than Mr. Schulman. I do agree that the
6 75 million that American Express has agreed to pay the class
7 counsel in fees is pretty much the salvage value of this class
8 action. And it's all flowing, all the cash is flowing to
9 class counsel and none of it is flowing to the class. Now, of
10 course, 75 million in the context of the damages demanded here
11 is a pittance, it couldn't possibly be distributed. So that's
12 not my chief objection to the fee.

13 But the maximum fee in this case would be class
14 counsel's lodestar if they achieved a settlement that
15 permitted differential surcharging. The holy grail.
16 According to *Perdue v. Kenny A.*, a successful plan, one that
17 prevails after trial is entitled to his or her lodestar and no
18 more. In this case and also *Hensley v. Eckerhart* requires the
19 fee to reflect the plaintiff's degree of success. If you
20 haven't achieved 100 percent success in the case, you're not
21 entitled to 100 percent of your lodestar. So if the lodestar
22 would be the fee for achieving the right to differentially
23 surcharge, what would be an appropriate fee for achieving what
24 they've achieved here which is parity surcharging? I would
25 submit it's less than 50 percent of that lodestar.

Mr. Lowrey

1 And with that I'll rest. Thank you, your Honor.

2 THE COURT: Thank you very much. Okay. And now
3 we'll hear from Mr. Lowrey who represents Home Depot.
4 Mr. Lowrey, welcome.

5 MR. LOWREY: Thank you, your Honor. I think the
6 most important question you asked today came when the
7 plaintiffs were extolling the benefits of parity surcharging.
8 And you asked, and I wrote it down, what is the benefit of
9 this settlement if you are wrong. And plaintiffs argued with
10 your premise, but everybody in this courtroom knows that the
11 answer to that question is none, your Honor, no benefit if
12 we're wrong.

13 Now, the release is going to be exactly the same.
14 We're going to release all rights to challenge all rules
15 except for the ones they modify. That release is going to
16 last for at least ten years, plus as long as American Express
17 and Visa and MasterCard maintain their current rules. That
18 release is going to apply regardless of the future market
19 effects. That language was read to you earlier, it's in the
20 settlement agreement.

21 Should the markets change in the future such that
22 these rules have an anticompetitive effect they do not have
23 now, you will have taken away the right away from us to bring
24 that claim.

25 Ultimately what the plaintiffs want you to do here

1 is they want you to predict the benefits of limited surcharge
2 and predict that those benefits are going to outweigh the cost
3 of the immunizing all of the rules that are immunized from
4 challenge by the settlement.

5 Now, your expert said that the benefits of this
6 settlement are highly uncertain, there's substantial
7 probability that the effect will be small or zero. I don't
8 know how your crystal ball works, mine has proved horribly
9 unreliable. I remember in the 1990s, I told one of my law
10 partner, why are you talking about getting a website, no one
11 is ever going to hire a law firm basined on what it says on
12 the website. And now Martindale-Hubbell books they're just in
13 furniture stores to fill up the loose space on the shelves.

14 Predicting technological and market developments for
15 the next ten or 20 years is a lot to ask of anyone. You could
16 hold this hearing for a year, you could hear from an expert
17 every day, we could all go to Australia, take a field trip, we
18 could all go rent cars, and at the end of all of that, the
19 best you'd ever be able to say is maybe, maybe this settlement
20 will produce a benefit. So I submit that is the last kind of
21 settlement you should be forcing on everyone with no right to
22 opt out.

23 You asked, markets might change in the future, maybe
24 a new investor group will come in, start a new credit card
25 company. Well, this settlement takes away our ability to

1 reward that innovation and reward the low cost competitor. If
2 their interchange fee is lower than American Express's, we
3 have to drop the surcharge to match the new entrant's lower
4 interchange fee. That wouldn't produce any competitive
5 pressure on American Express, we couldn't reward that new low
6 cost competitor by discriminating in its favor or steering
7 business to it.

8 So one of the major issues we have that this
9 settlement really comes down to the adequacy of any group of
10 merchants, this one or any other group of merchants making
11 those choices for everyone.

12 The case law tells you that adequacy of
13 representation requires your crucial scrutiny under two
14 circumstances; one is when there is going to be a settlement
15 and there's not going to be a trial where you get to
16 thoroughly understand, hear all the evidence, hear all the
17 witnesses, and the other is a settlement where there is no
18 opt-out right like this one.

19 Now, the plaintiffs' answer to that is to say just
20 look at the paper, your Honor. If you just look at the four
21 corners of the settlement agreement, all merchants are getting
22 the same rights and they're giving up the same rights so we
23 must have an adequacy of representation to do this on
24 everyone's behalf. But that's the wrong analysis. We're
25 giving up a list of rights and we're getting some rights.

1 The problem is merchants value these rights very
2 differently. So, think about it for a minute. Wouldn't it be
3 amazing if 6 million merchants, current or future, regardless
4 of their size or their leverage, vis-a-vis American Express,
5 regardless of what kind of contract they have negotiated with
6 American Express, regardless of their business type, their
7 customer base, the regulatory structure they answer to, the
8 location, it would be amazing if all merchants actually valued
9 the various rules that we give up or the various rights we
10 give up under this settlement the same as the rights we're
11 getting. That's something that would have to be proved to
12 you, and I can't even imagine the evidence that would prove
13 it. But I don't have to because that evidence is completely
14 missing from this record. There's no evidence that the rights
15 that are taken away are valued by all merchants less than the
16 rights that are given. There is a conflict. Why should one
17 small group of merchants, this group or anyone else get to
18 make that choice for everyone?

19 Why is their judgment about what's good for our
20 business better than our judgment about what is good for our
21 business? I think the court has already remarked that the
22 volume of American Express transactions represented by the
23 objectors essentially dwarfs any volume represented by the
24 named plaintiffs. Not your words but I think that the record
25 is clear on that. Why did they get to make the decision for

1 us?

2 If you were going to make a decision on this and you
3 could build an annex to this courthouse and get all 6 million
4 merchants in here, the last thing you would do is say, hey,
5 you four, what do you think. Okay, that's what we're doing,
6 everybody else, what they said. You'd never do that. But
7 that's exactly what they're asking you to do here.

8 What's the alternative, they say? Well, look, this
9 case doesn't have to proceed as a class action at all. The
10 alternative is simply that you don't involuntarily extinguish
11 our rights. If that means there's no settlement, there's no
12 settlement. If that means that you don't certify this class
13 at all and just allow these plaintiffs to proceed on their own
14 against American Express, so be it. But the answer is let
15 everyone decide for themselves. That's our right.

16 And the plaintiffs' answer to that is, well, if the
17 large merchants aren't in this, how do we ever help the small
18 merchants. Well, they might as well stand before you and
19 admit that they're taking our claims and using them to
20 subsidize relief from merchants that couldn't get it without
21 our claims. And that is a classic conflict of interest. They
22 are selling off the large merchant claims to get relief for
23 the small merchants. That is a conflict of interest and
24 represent no group, not criticizing this group, no group would
25 be adequate to make that decision for everyone.

1 THE COURT: But your client, along with other
2 objectors are extremely large merchants have a great deal of
3 leverage in the process of negotiating merchant agreements
4 with -- the merchant agreement with American Express. So you
5 have -- those small merchants don't have a seat at the table.
6 You have a seat at the table. And you and other large
7 merchants, as was shown at the trial that we had over the
8 summer, do indeed negotiate specific terms that are beneficial
9 to them in a give and take situation. So you really -- in
10 that sense, you have a great deal of leverage in dealing with
11 American Express that the smaller merchants who are also
12 members of this proposed class do not have. How do you
13 address that?

14 MR. LOWREY: Well, a couple of things about that.
15 That leverage is not translated into a favorable interchange
16 fee, I can tell you that. That's one thing.

17 They may not have the same seat at the table they
18 do, "they" being the small merchants, but that's why there's a
19 conflict here. They can't take our seat at the table. They
20 can't force us to stay at the table to protect them. You
21 know, it's not our job to look out for anyone but us. And if
22 the class has conflicts like that, you don't certify a class
23 and impose a solution on everyone.

24 We may have more leverage than the small merchants,
25 that doesn't mean that we can afford to give up all of our

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1 legal rights to challenge their entire slate of rules except
2 for this one. We can't afford to do that. We need to resort
3 to the legal system and it can't be taken away from us without
4 our consent, which is really the major point that I want to
5 emphasize.

6 To me, it is absolutely clear under the Dukes
7 decision that this settlement cannot be imposed on us without
8 opt-out rights. When you go back tonight and you read Dukes,
9 because I know you're going to jump right into this, read
10 Section 3 and mark with your red pen.

11 THE COURT: I've read Dukes a number of times.

12 MR. LOWREY: Well, you probably highlighted the same
13 passage that I did.

14 THE COURT: We venerate Dukes.

15 MR. LOWREY: I sleep with it under my pillow myself,
16 your Honor. Your copy of Dukes probably has the same passage
17 highlighted that mine does.

18 THE COURT: Okay.

19 MR. LOWREY: And it's the one that talks about how
20 even a properly certified (b)(2) class that predominates over
21 damages, even if you have those things, properly certified
22 (b)(2) class that predominates, you still can't take away
23 individualized damages without a right of opt-out. Now, the
24 plaintiffs' answer to that is, wait, we're providing only
25 injunctive relief, we're not providing any damages. Because

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1 we're providing only injunctive relief, we can release and
2 settle your damages claims. That can't be right. It can't be
3 right.

4 The Supreme Court says the opposite of that in Dukes
5 and I found -- I mean, I honestly think that that point
6 doesn't need authority but I found some. There is a good
7 decision called Richardson versus L'Oreal. It's reported at
8 991 F Supp. 2d 181. And the good stuff is on page 199.
9 That's a District of DC decision. And the exact point that
10 court made, you heard the same argument the plaintiffs made
11 here because we aren't giving any monetary relief. We can
12 simply extinguish damages claims about allowing a right of
13 opt-out. And the court said that's absurd, that's exactly
14 what Wal-Mart rejected.

15 THE COURT: Who was the judge in that case?

16 MR. LOWREY: I don't have that written down, your
17 Honor. Obviously a very wise jurist.

18 UNKNOWN SPEAKER: Judge Bates, your Honor.

19 THE COURT: I'm sorry?

20 UNKNOWN SPEAKER: Judge Bates, your Honor.

21 MR. LOWREY: As I said, let me acknowledge right now
22 because you'll hear it on rebuttal, the Visa/MasterCard
23 approval order rejected this argument. I admit that. No
24 secret about that. What the Visa/MasterCard approval order
25 says is -- there are two sentences that really address this

1 issue.

2 The first one: Rule 23 contemplates binding
3 settlements with no opt-out rights where the injunctive relief
4 achieved by the settlement is appropriate for the class as a
5 whole. No question that's true. But it doesn't contemplate
6 binding settlements with no opt-out rights where you're
7 extinguishing individual damages.

8 The other sentence is this one.

9 THE COURT: Is this the sentence from Judge
10 Gleeson's decision?

11 MR. LOWREY: It is, your Honor, at page 41 of the
12 docket entry version.

13 THE COURT: Go ahead.

14 MR. LOWREY: The second sentence says this, The
15 (b) (2) settlement here is limited to going forward injunctive
16 relief that changes the structure of the network's practices.
17 Also absolutely true, but the release is not. The release in
18 settlement is not limbed to injunctive relief. It wasn't in
19 that case and it isn't here. The release here encompasses all
20 of our future damages claim. And that's what you can't do
21 without letting us opt out.

22 So the plaintiffs say, well, judge, no one would
23 settle (b) (2) claims if you couldn't release related damages.
24 Now, let's be clear about one thing. The damages claim we're
25 talking about are not damages that somehow flow from them

1 allowing surcharge, right? They're not going to violate the
2 antitrust laws by letting us do stuff. The damages claims
3 we're talking about are from the list of rules that they have
4 now and that they get to have forever, or at least ten years
5 plus under this settlement.

6 But I acknowledge that, (b) (2) is no use to you if
7 what you want to do is have final relief that extinguishes all
8 individual damages claims. We sell tools at the Home Depot
9 and if someone bought a screwdriver and came back to us and
10 said, look, this screwdriver is defective, I can't use it to
11 drive nails, one of our guys in the orange apron would say,
12 politely I hope, you got the wrong tool. And that's the
13 problem here. (b) (2) is the wrong tool if what you want to do
14 is extinguish future damages claims. Is that inconvenient?
15 Well, yeah, it's more inconvenient than having to give people
16 notice and the opportunity to opt out. But due process is an
17 inconvenience. The rules are chock full of inconveniences.

18 A couple of points on the authorities they cite.
19 They cite Robertson versus NBA. That was decided 34 years
20 before Dukes by the Second Circuit, can't possibly govern
21 here. There's a typo in the plaintiffs' citation on it on
22 page 44 of their reply brief. They quoted as saying
23 preclusion of the opt-out right in a (b) (2) settlement does
24 not violate due process. The actual text in the case is
25 talking about a (b) (1) settlement. I know that's an

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1 inadvertent typo but my point is just to clarify that
2 Robertson does not address the (b)(2) questions that Dukes
3 does address. And Dukes governs anyway, right --

4 THE COURT: What?

5 MR. LOWREY: Dukes governs anyway regardless of what
6 the Second Circuit said in 1977.

7 They also cite Literary Works, that case, and they
8 cite the Wal-Mart v. Visa decision. And those were both cases
9 where there were broad releases including future claims in
10 Literary Works. And in both cases, there was a right of opt
11 out. In Literary Works, there was a right of opt out from the
12 future copyright release portion of the settlement. And in
13 Wal-Mart versus Visa the very point the court made is, yes,
14 this release is binding. If you didn't want to be bound by
15 it, you should have opted out.

16 Well, that's what we would like to be able to do
17 here and that's what these plaintiffs seek to deny us the
18 right to do.

19 THE COURT: You think there would have been a
20 settlement with an opt-out provision?

21 MR. LOWREY: I don't know. They obviously have to
22 tell you no, right? If that's like the story about you buy my
23 lawnmower for 70 or 80 dollars, and your response is well,
24 obviously 80 is out of the question. I mean, they obviously
25 can't show up and say, yeah, we would have done the deal

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1 either way. They've got to say, it wouldn't be a deal if you
2 allowed opt-outs.

3 But let's assume for a moment there wouldn't be a
4 deal if opt-outs were allowed. All that shows is that they
5 have to take the claims of the large merchants as part of the
6 settlement, that they're using -- they're buying off our
7 claims for relief we consider to be worthless or very little
8 value and taking our rights.

9 They haven't really tried to make the argument that
10 our damages claims are merely incidental, I don't think their
11 heart would be in it anyway. But to the extent they do argue
12 that, let me speak on that briefly. And I may run a few
13 seconds over if that's okay.

14 THE COURT: Go ahead.

15 MR. LOWREY: Our damages claims can't be viewed as
16 merely incidental under Dukes. Their first explanation of why
17 they're merely incidental is to say, look, you're just giving
18 these up basically to make the injunctive relief work. In so
19 many words, because your getting injunctive relief we've got
20 to take your damages claims. Well, if that argument made
21 damages claims incidental, then they would have been
22 incidental in Dukes and they would be incidental in every case
23 where all you grant is injunctive relief.

24 The key thing here is that our antitrust damages are
25 just as individualized as the back pay damages were in Dukes.

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1 They depend on each merchant's experience and leverage. What
2 interchange fee could we have negotiated without these
3 merchant rules? There's probably a different answer for every
4 merchant in this room, and it depends on circumstances and
5 size.

6 I would add this, unlike back pay, which for some
7 reason had traditionally been viewed as equitable and
8 appropriate for (b)(2) relief. If the traditionally equitable
9 nature of back pay didn't make those damages incidental in
10 Dukes, there's no way our damages at law for antitrust could
11 be incidental.

12 You know, in our future damages that's a very
13 valuable right. You know, troubled damages in the future
14 would compensate us for any violation but it would also deter
15 future conduct. So troubled damages double as an injunction.
16 It gives you most of what an injunction would give you plus
17 three times every dollar you lose. That is an extraordinarily
18 valuable right that can't be taken from us without the right
19 to opt out.

20 Those are really the remarks that I had planned to
21 make, your Honor. Any questions particularly about Dukes? I
22 mean, to me that issue is absolutely clear so much so that I
23 don't see the counterargument. So if there is any -- if there
24 is any different view or out that we could test, I would
25 appreciate the opportunity to do it. But if you've heard the

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1 answers to everything, then I'll...

2 THE COURT: Thank you very much.

3 MR. LOWREY: Thank you very much.

4 THE COURT: Before we go any further, I see the
5 senior partner from Cravath, Swaine & Moore is here.

6 MR. GOLD: Good afternoon, your Honor.

7 THE COURT: Good afternoon. Nice to see you,
8 Mr. Gold.

9 Now, when I walked in this building this afternoon,
10 Mr. Chesler was walking in. And now there's no Mr. Chesler.
11 So is this a test for my powers of observation?

12 MR. GOLD: I'm now going to try to play the role.

13 THE COURT: But he came into the building this
14 morning.

15 MR. GOLD: He did, but he had a prior engagement
16 that required him to leave.

17 THE COURT: Oh, all right. Okay. I thought it was
18 something I said.

19 MR. GOLD: No, your Honor.

20 THE COURT: All right. Thank you.

21 At this point we're up to Southwest Airlines, et al.
22 Mr. Slater, good afternoon, sir. Nice to see you.

23 MR. SLATER: Good afternoon, your Honor. Paul
24 Slater on behalf of the Southwest Airlines group and also the
25 individual independent merchants.

Mr. Slater

1 Your Honor, before I start I'd like to hand out a
2 couple of documents that I'd like to use for the court.

3 THE COURT: Do you plan to put anything up on the
4 screen?

5 MR. SLATER: No. And I'm not even sure I'm going to
6 use the three documents that I have.

7 THE COURT: Go right ahead.

8 MR. SLATER: Thank you, your Honor. A fair amount
9 of what I had planned to say has already been said by others
10 and I won't repeat it.

11 THE COURT: Thank you.

12 MR. SLATER: What I would like to do is address four
13 specific points and then a recap of the Grinnell factors that
14 control this court's decision. The first issue I'd like to
15 talk about is the purported need for uniformity in the
16 enforcement of the antisteering rules. AmEx claims in its
17 papers that the antisteering rules must be uniformly applied
18 to all merchants.

19 This is the only justification which is given for
20 why we have a non-opt-out class which imposes on the objectors
21 and certainly on the individual merchant plaintiffs a release
22 which is not to their liking.

23 AmEx never explains why it is that uniformity is
24 required in the application of their antisteering rules, they
25 just say it. The contention, your Honor, as was noted earlier

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1 today, is contrary to the evidence of the testimony at the
2 trial during the government case. Mr. Quagliata, the AmEx
3 employee -- and I got some of that testimony in those
4 documents that I've handed you, but they've already been put
5 up by Mr. Canter.

6 Mr. Quagliata very clearly said that for large
7 merchants that they negotiated the individual exceptions to
8 the antisteering rules and they do not apply those rules
9 uniformly to all of the large merchants. So there is no need
10 for this purported uniformity.

11 Now, a few minutes ago your Honor inquired as to
12 whether the ability to negotiate with American Express gave or
13 indicated that the large merchants had some leverage with
14 American Express. It does not, quite the contrary. One of my
15 clients, Southwest Airlines, testified at the trial. AmEx
16 went to them and said, we're raising your price. I won't go
17 into the numbers because they're confidential. AmEx said to
18 Southwest Airlines, the largest airlines in the United States
19 of America, tough, we're raising your price. There's nothing
20 you can do about it.

21 The reason that there's nothing the merchant can do
22 about it is because the merchant can't respond to differential
23 surcharging or, as Mr. Arnold said, differential pricing. The
24 merchant can't say, well, you can raise my price but I'm going
25 to pass it on to the consumer and if he doesn't like paying

1 that price for your supposedly wonderful service, he'll
2 migrate to a different credit card, you will lose volume.
3 That's exactly what is supposed to happen in a competitive
4 market where price competition, the very touchstone to the
5 antitrust laws where price competition is respected and is
6 allowed to operate.

7 The reason that Southwest Airlines and the other
8 merchants can't have that leverage is because the antisteering
9 rules, the no differential surcharge rule, no differential
10 pricing rule, prevents them from exercising that incentive,
11 which Professor Hemphill said is the touchstone of horizontal
12 price competition.

13 So I believe the first point I want to make is that
14 uniformity is not needed in the application of the rules.
15 There's no justification for imposing this release on the
16 unwilling objectors, and that the fact that the large
17 merchants can negotiate with American Express does not mean
18 that they have leverage with regard to the pricing issues.

19 The second point I want to cover is with regard to
20 the humanness of objectors. The classes contend that there
21 are very few objectors and that this weighs in favor of
22 approval. Your Honor, I would submit that exactly the
23 opposite is true. There are very few proponents. The only
24 merchants in America who step forward to support this
25 settlement are the few relatively small plaintiffs represented

1 by class counsel.

2 There are a great many objectors and, as your Honor
3 has noticed, they are the largest merchants in America. Your
4 Honor, under Tab B in the documents that I've handed out, this
5 is Exhibit 8 to the report of the Dr. Vellturo, his opening
6 report submitted on April 3, 2013. And Dr. Vellturo is one of
7 the expert economists for the individual merchant plaintiffs.

8 This is a list of the hundred largest retailers in
9 the United States as of 2011. Your Honor, 19 of the top 20
10 merchants on this list are here in this courtroom objecting to
11 this settlement. Twenty-four of the top 27 on this list are
12 here objecting to this settlement. The other three merchants
13 aren't here at all. They don't -- it's not that they support
14 the settlement they just haven't weighed in.

15 The list of objectors reads like a who's who of
16 American retailers. You've got Wal-Mart, Target, Costco, Home
17 Depot, BestBuy, Sears, Amazon, Staples. Your Honor, I can go
18 on, but you got the idea. All of the major drugstore chains
19 in America are individual merchant plaintiffs. All of them
20 object. That's Walgreen, CVS, and Rite Aid. All of the major
21 supermarket chains in America are here objecting to this
22 settlement. Not one major merchant, your Honor, has stepped
23 forward to say that they support this settlement. Not one.

24 Not one major merchant in America has stepped
25 forward and said that they would parity surcharge or that it's

1 of any value to them. None. The handful of small merchants
2 represented by class counsel do not speak for the major
3 merchants and they cannot possibly be an adequate
4 representative for the major merchants.

5 Let me move to the next subject. The class claims
6 that, quote, the great majority, the great majority, their
7 term, of surcharging in Australia is parity surcharging. They
8 also claim that most merchants who surcharge in Australia, and
9 I quote again, apply the same surcharge to all brands. Your
10 Honor, that contention is incorrect.

11 In 2007, class counsel asked East & Partners the
12 source of the data which is the fount of their argument. They
13 asked East & Partners to do a special report for class
14 counsel. Class counsel didn't reference this in their papers
15 but I've attached it in that little folder. This is under Tab
16 C. This is the merchant surcharging in Australia market
17 analysis report addendum for the Friedman Law Group, LLB.

18 Your Honor, at page 2 of the report it says this:
19 The average surcharges applied by merchants on charged cards,
20 AmEx and Diners, are typically twice the average surcharge on
21 credit cards. So in Australia the average rate which AmEx is
22 surcharged is more than double. The chart below shows that
23 Visa and MasterCard are surcharged at an average rate of
24 1 percent. AmEx's average surcharge is 2.1 percent. It's a
25 little bit more than double the rate.

1 The majority, the vast majority of the surcharging
2 in Australia is differential surcharging. In fact, at page 3
3 of the same report, it says that of the merchants who
4 surcharge, and I quote, the majority surcharge differential
5 with charge cards -- remember that's their term for AmEx and
6 Diners Club -- with charge cards clearly targeted more than
7 credit cards. The merchants in Australia differentially
8 surcharge. The impact of that is enormous, it drives rates
9 down.

10 We've cited to your Honor, and again I won't go into
11 the data because it's under protective order, but we've cited
12 to your Honor instance after instance of where a large
13 merchant was able to go to AmEx in Australia and say, I will
14 differentially surcharge your card unless you lower your
15 price. In other words, let the downward bidding begin. Let
16 the price competition begin. And AmEx reduced their price by
17 enormous magnitudes in response to the ability to
18 differentially surcharge.

19 Your Honor, the East & Partners report from 2009,
20 which was cited in our papers, says the same thing. The East
21 & Partners report from 2010 and 2012, again, says that higher
22 priced cards, that would be AmEx and Diners, are surcharged
23 more often and they're surcharged at a higher rate.

24 Your Honor, I have one final observation, then I'll
25 get briefly to the Grinnell factors. And the observation is

Mr. Slater

1 this: This settlement puts, I believe, the court and
2 certainly the individual merchant plaintiffs in an unfair
3 posture. Now, why do I say that? The class and AmEx agree
4 that the individual merchant plaintiffs are entitled to a
5 trial on their past damage claims, no matter what happens with
6 this settlement.

7 Let's assume that we go forward and we prove at
8 trial that the ban, the prohibition on differential
9 surcharging is unlawful. Let's assume the court has approved
10 of this settlement. Here is the uncomfortable position in
11 which we would find ourselves. The individual merchants will
12 have established that the ban on differential surcharging is
13 unlawful. But we will have been ordered by this release to
14 not challenge or enjoin the continuation of that unlawful
15 behavior and we would have been ordered by your Honor that we
16 can't seek damages for the continuation of that unlawful
17 activity.

18 Your Honor, I do not believe that any settlement
19 which has the potential for resulting in that event where
20 we've established the illegality and are denied any remedy
21 going forward, I don't believe that any settlement that does
22 that could possibly be characterized as fair, adequate or
23 reasonable.

24 Let me move briefly to the Grinnell factors because
25 I really don't think the class can establish a single one of

1 them.

2 THE COURT: Do you think the question that you just
3 raised is a question of law?

4 MR. SLATER: Your Honor, could I pump the question
5 by saying it's probably a mixed law question of fact.

6 THE COURT: Well, if it's a mixed question, then
7 it's a question for the court. If it's a question of fact,
8 it's a question for the jury. I'm just wondering --

9 MR. SLATER: Oh, maybe I didn't understand your
10 Honor's question. Are you asking whether the question of
11 whether the prohibition on differential surcharging is a
12 question of law or a question of fact?

13 THE COURT: Right.

14 MR. SLATER: It would be for the jury to determine
15 whether the prohibition on differential surcharging amounted
16 to an unreasonable restraint of trade within the meaning of
17 the Sherman Act.

18 I also believe that as a matter of law a direct
19 prohibition on horizontal inter-brand price competition is a
20 violation of the Sherman Act. So, again, I would say that as
21 a matter of law what they've done is unlawful. If we thought
22 that it would have advanced things, we would have filed a
23 motion for summary judgment on that grounds. But given the
24 history of summary judgment in the Second Circuit, we decided
25 it would be better just to try the case.

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1 But do I believe as a matter of law a ban on
2 horizontal inter-brand price competition is unlawful?
3 Absolutely. It is the paradigm sim of the Sherman Act. It's
4 the one thing you cannot ever do.

5 THE COURT: And so we can have a jury trial and the
6 jury could come up with an answer and there could still be a
7 judgment based on a question of law afterwards?

8 MR. SLATER: Procedurally, Judge, I honestly don't
9 know the answer to that question.

10 THE COURT: Well, it's pretty complicated. I'm just
11 trying to get some help.

12 MR. SLATER: Yeah, and I wish I could --

13 THE COURT: I'm sure everyone will be willing to
14 help me later on. I'll wait on that. We're jumping way ahead
15 of ourselves here. Go ahead.

16 MR. SLATER: Let me move quickly to the Grinnell
17 factors, your Honor.

18 The first factor is the complexity, duration and
19 expense of the litigation that is left. In other words, how
20 much expense and litigation is left to be done.

21 With regard to the individual merchant plaintiffs,
22 Judge, none. We've already gone through all the hurdles and
23 all the hoops. We've completed fact discovery, we've
24 submitted three rounds of expert reports. As your Honor
25 knows, we've done the expert depositions and we've briefed and

1 argued summary judgment. There's nothing left for us to do.
2 We've suffer -- or no gain no benefit in the reduction of the
3 burden on us by a resolution now not to our liking.

4 THE COURT: By the way, and this has nothing to do
5 with the fairness hearing, how long do you think your case
6 would be to present at trial? Have you thought about that?

7 MR. SLATER: Can I deter to Mr. Arnold on this one?

8 THE COURT: I could plan the rest of my career here.

9 MR. ARNOLD: Your Honor, Richard Arnold on behalf of
10 the individual plaintiffs. We think that depending on the
11 ruling in the DOJ case, if the DOJ prevails, there's going to
12 be some preclusion issues regarding American Express. But
13 assuming just in a vacuum without presuming any of that, we
14 think, and having sat and watched this trial, as well as you
15 kept that chest clock we think 50 hours for each side we can
16 try the case.

17 THE COURT: Fifty hours?

18 MR. ARNOLD: 50 hours, yes, your Honor.

19 THE COURT: I was just curious.

20 MR. ARNOLD: Yes. On each side, I mean they
21 obviously --

22 THE COURT: No, I understand that. I got it. All
23 right. Thank you.

24 MR. SLATER: Your Honor, the second Grinnell factor
25 is the reaction of the class. I would submit that the

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1 reaction of the class was very, very heavily against the
2 approval of this settlement. Not one merchant has stepped
3 forward to say they support the resolution.

4 The third factor is the state of the proceeding, the
5 amount of the discovery completed. Again, in our case all the
6 discovery is completed, we're ready to go. In the class case,
7 no class representative has ever been deposed. There has been
8 no class discovery taken either by AmEx or by the class
9 itself. There have been no expert reports, no expert
10 depositions and of course no summary judgment practice.

11 It would be upside down, Judge, to put the less
12 prepared case in a position of preference over the more
13 prepared and ready to go. So we submit that this factor
14 weighs heavily against approval.

15 The fourth factor is the risk of establishment
16 liability. Mr. Arnold addressed this. We think the case on
17 the merits is extremely strong. We think the defense is very
18 weak. And we think the settlement and resolution is very
19 weak. The comparison of the quality of the settlement and the
20 quality of the relief to the strength of the merits of the
21 case weighs heavily, heavily against approval.

22 The risk of establishing damages is the
23 fifth factor. Your Honor, this one can't possibly help the
24 class because each merchant, according to the settlement
25 they've reached, would have to go to his own individual

1 arbitration to establish his own damages. No burden is
2 alleviated by the quality of this settlement.

3 The sixth factor is the risk of maintaining the
4 class through trial. Again, your Honor, this factor is very,
5 very clear. We know what the risk is, that this class will be
6 able to be held together. The class acknowledges that due to
7 Italian Colors it has no damage claim and cannot proceed as a
8 damaged class. We know from the motion filed by American
9 Express that it's very unlikely that they have no claim for
10 injunctive relief either.

11 The posture of this case, and the likelihood of
12 maintaining a class through trial is functionally zero.
13 That's precisely why the class should not be permitted to
14 settle against our will of our claims. Excuse me, can I get a
15 glass of water, Judge?

16 Your Honor, the seventh factor is the ability of
17 American Express to withstand the greater judgment. Two
18 points. They can clearly withstand a greater judgment of
19 \$75 million.

20 With regard to injunctive relief, it's clear from
21 Australia that they can withstand a judgment that says
22 merchants can differentially surcharge. That's effectively
23 what happened to them in 2003 due to the order of the Reserve
24 Bank of Australia. They're doing fine in Australia. They had
25 to lower their price and they had to compete on a price. But

1 that's not a death knell. That's just get in line and get out
2 there and compete with everybody else just like everybody
3 else.

4 The eighth factor is the reasonableness of
5 settlement in light of the best possible recovery. Your
6 Honor, the best possible recovery here from my perspective is
7 that they're ordered to stop prohibiting differential pricing,
8 let the horizontal inter-brand price competition take hold and
9 let it do its work.

10 So what's the settlement? As been told to your
11 Honor several times today, Professor Hemphill found the
12 settlement to be of no or little value. The benefits to the
13 class of the ability to differentially surcharge, including
14 the small merchants, Judge, would be enormous. If we go to
15 trial and win, those small merchants are going to be lining up
16 claiming collateral estoppel. And the terrible, you know,
17 fate that will befall them, which has been predicted by some
18 in this courtroom today, is not true. All they'll have to do
19 is figure out what their damages are and batter up.

20 The ninth factor is the reasonableness of settlement
21 fund in light of the litigation risk. This one is pretty
22 easy, there is no settlement fund.

23 Your Honor, I've overstepped my time which I really
24 was hoping not to do. I apologize for that.

25 THE COURT: That's quite all right.

1 MR. SLATER: Thank you very much.

2 THE COURT: All right. Next we have Mr. Schwartz
3 representing the United States of America.

4 MR. SCHWARTZ: Thank you, your Honor. Adam Schwartz
5 with the Civil Division of the United States.

6 THE COURT: Were you here during the trial?

7 MR. SCHWARTZ: I was not, your Honor. I am here
8 with Mr. Hamer because there's sort of different forms of
9 relief rather than pursuing an enforcement action.

10 THE COURT: I see.

11 MR. SCHWARTZ: The civil division is involved in
12 this matter.

13 THE COURT: Fine. Welcome.

14 MR. SCHWARTZ: Thank you. While the other objectors
15 that you've heard from today have raised objections regarding
16 the merits of the case, the United States here is in a
17 slightly different position. We are here, as we said in our
18 papers, because we do not believe we should be here. The
19 United States has never once asked to be a part of the this
20 class, and pursuant to 28 U.S.C. 516 and 519, the authority
21 to represent the United States is vested in the attorney
22 general or his designee.

23 THE COURT: Okay, stop. Do the parties to this
24 proposed settlement agree that the United States should not be
25 party to this settlement under the statute that was just

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1 identified?

2 MR. KOROLOGOUS: I'm not sure I completely follow
3 your Honor's question. American Express --

4 THE COURT: Well, the government is saying that they
5 shouldn't be covered by the settlement, that they shouldn't be
6 subject to the terms of the settlement if it's approved
7 because of that statute. I'm just wondering whether you have
8 a view on it so that Mr. Schwartz doesn't have to stand here
9 for 15 minutes and tell me all the reasons why.

10 MR. KOROLOGOUS: We do and we oppose the
11 government's position. We believe that they are merchants.

12 THE COURT: Okay, thank you. Now you can speak.
13 Otherwise you would have to sit down.

14 MR. SCHWARTZ: I would gladly sit down if our
15 interests would be protected. But I believe that is the
16 problem here, that those statutes not only refer to instances
17 where the United States is a party to the litigation but also
18 instances where the United States has an interest in the
19 litigation.

20 THE COURT: And in this case you have an interest.

21 MR. SCHWARTZ: In this case we have an interest in
22 the litigation as claims for the United States have been
23 included in the class settlement when they were not originally
24 included. In the consolidated class action complaint, in MDL
25 2221, it excluded all government entities from the settlement

1 class. The settlement that is before you today includes all
2 governmental entities and there's no carve-out for the United
3 States.

4 As I said before, the attorney general or his
5 designee has not been involved in the negotiation of the
6 settlement and in fact was not apprised of the settlement
7 until after class counsel and counsel for American Express
8 negotiated the settlement and then provided notice of
9 the settlement to all parties.

10 American Express nor class counsel can point to a
11 single statute that gives them the authority to represent the
12 United States over the attorney general. The only regulation
13 that they're relying on is Rule 23 of the Federal Rules of
14 Civil Procedure. As the case law interpreting 28 U.S.C. 516
15 and 519 has said, though, in order for there to be a grant of
16 authority from the attorney general to another individual to
17 represent the United States, there has to be a clear and
18 unambiguous grant of the authority. Nowhere in Federal Rule
19 of Civil Procedure 23 will you find any grant of authority
20 stating that either class counsel or counsel for the defendant
21 in that action has the authority to represent the United
22 States.

23 We were not party to that litigation and we did not
24 give our consent to be a part of this litigation.

25 I want to the contrast --

1 THE COURT: In fact, you have -- the government, the
2 United States has avoided any involvement in the question of
3 surcharging, isn't that --

4 MR. SCHWARTZ: That's correct. To this point we
5 have. And our interest --

6 THE COURT: Are you planning to jump in?

7 MR. SCHWARTZ: Your Honor --

8 THE COURT: I just want to be forewarned.

9 MR. SCHWARTZ: At this time, your Honor, the answer
10 to that is no. Obviously the United States is made up of
11 multiple agencies and entities, and the reason that the
12 attorney general has this authority is because there has to be
13 in a sense a clearinghouse for one person to represent the
14 interests of the United States and determine which entity's
15 concerns would take priority over another.

16 THE COURT: All right.

17 MR. SCHWARTZ: What I do want to do is contrast
18 Federal Rule of Civil Procedure 23 with the False Claims Act.
19 The False Claims Act, as your Honor may or may not be aware,
20 allows private parties, relators, to bring cases in the name
21 of the government.

22 THE COURT: I'm very familiar with relators of the
23 False Claims Act.

24 MR. SCHWARTZ: Excellent.

25 THE COURT: My docket is filled with the --

1 MR. SCHWARTZ: Well, we're trying to move them as
2 quickly as we can, your Honor, but as you know, they keep
3 coming and we --

4 THE COURT: Oh, I have other things to do, so don't
5 bother yourself. Go ahead.

6 MR. SCHWARTZ: Well, I just want to make point that
7 obviously in the False Claims Act if the government decides
8 not to proceed with an action, there's a provision that
9 expressly gives the relator and his attorney the right to
10 proceed. There's nothing in either the advisory notice or in
11 Federal Rule 23 itself that provides that if the government
12 does not make a decision to opt in or join a non-opt-out class
13 action that the government's claims can be resolved without
14 its involvement. So that is not present here.

15 One argument that on the papers American Express has
16 made is that 516 and 519 are just ministerial statutes and
17 that they really just deal with how the government internally
18 handles its business. So the attorney general is vested with
19 the authority to represent the United States, but other
20 entities like the FTC or ICC have to go through the attorney
21 general.

22 I contend that that would create an absurd result
23 where a private party is vested with more authority to
24 represent the interests of the United States than an agency of
25 the United States. So if that authority is granted, then

1 private litigants in class action lawsuits will be able to
2 resolve any number of claims on behalf of the government
3 without the government ever getting notice of that. This
4 would completely obliterate the purpose of Rule 516 and 519
5 which is for the attorney general to proceed with litigation
6 and to be a centralized warehouse to handle that litigation and
7 determine what's in the best interests of the United States.

8 It would create a quagmire and a public policy
9 disaster. There would be no way -- there's hundreds of class
10 actions going on throughout the country at any one time and
11 for the United States to somehow stay apprised of all of these
12 without getting any proper notice and try and figure out
13 whether the interests of the United States are being
14 compromised without any of its involvement would just be an
15 impossible task for the United States to engage in.

16 THE COURT: Well, but on the other hand, the United
17 States is heavily involved in an aspect of this case. There
18 are basically three elements, three parts to this case.

19 There's the class action, there's the individual
20 merchant plaintiffs case. Right?

21 MR. SCHWARTZ: Mm-hmm.

22 THE COURT: There are those two. And then there's
23 the government's case of the Sherman Act Section 1.

24 MR. SCHWARTZ: The enforcement action, correct.

25 THE COURT: The enforcement action. So it is very

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1 familiar with the overall situation in this, quote, case but
2 it has chosen not to involve itself in the class action.

3 MR. SCHWARTZ: That's correct, your Honor. We've
4 elected to pursue at this time remedy through the enforcement
5 action that Mr. Hamer and the antitrust division is bringing.
6 So we have purposefully not joined this class action and this
7 litigation, and we're now put in a position where the United
8 States for, in my understanding, the first time would be held
9 against its will as part of a class and have to accept class
10 relief and thereby extinguish claims that the government may
11 be able to bring at a later time.

12 THE COURT: Okay. Thank you.

13 MR. SCHWARTZ: Thank you, your Honor.

14 THE COURT: Thank you very much.

15 All right. Now on the list I have Dashon Hines.

16 MR. SLATER: Your Honor, I believe Mr. Hines
17 informed us that he would not be here today.

18 THE COURT: He's not here today? Well, if he's not
19 here, he's not here. Is Mr. Hines here?

20 All right. I note that Mr. Hines requested time but
21 that he is not here today.

22 MR. SLATER: We were in communication with him and
23 he told us that other people could use his time.

24 THE COURT: Oh, well, that's very kind of him.

25 All right, what we're going to do at this point --

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1 well, let me ask this, is there anyone who is not on the list
2 who is an objector who wishes to be heard at this time? All
3 right. Hearing no one, what remains is the proponents'
4 rebuttal and let's take a ten-minute break and then I'll hear
5 from the proponents. Thank you.

6 MR. KOROLOGOUS: Thank you.

7 (Brief recess.)

8 (Continued on the next page.)
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1 (In open court.)

2 THE COURT: Okay. Now we'll have deponents
3 rebuttal, Mr. Korologous.

4 MR. KOROLOGOUS: Good afternoon, your Honor.

5 THE COURT: How long did you want to take?

6 MR. KOROLOGOUS: Your Honor, I'm going to make a
7 variety of quick points, I'm not sure exactly how long they'll
8 take, but then the balance of time I will leave to the moving
9 class for the final order.

10 THE COURT: Okay, please go ahead.

11 MR. KOROLOGOUS: Thank you, your Honor. Your Honor,
12 going roughly in some of the order that we heard some of the
13 objections, at least for the points that American Express
14 wishes to address, I'd like to start by focusing on apparently
15 one of your favorite cases, Dukes, and identify, again, what
16 the standard is under 23(b)(2) and under Dukes for approval.

17 Judge Gleeson in the 1720 case described it as Rule
18 23(b)(2) class is warranted when the party opposing the class
19 has acted or refused to act on grounds that apply generally to
20 the class so that final injunctive relief is appropriate
21 respecting the class as a whole. And as the Supreme Court
22 said in Dukes, the test is whether the challenged conduct,
23 which here is American Express's nondiscrimination provisions
24 in its Honor All Card provisions, whether those provisions can
25 be enjoined or declared unlawful only as to all of the class

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1 members or as to none of them. In other words, Rule 23(b) (2)
2 applies only when a single injunction or declaratory judgment
3 would provide relief to each member of the class.

4 And the relief here is the rules change, that's
5 agreed to in the settlement. That does not go to the question
6 of who will benefit how much by being able to invoke that rule
7 change or not, who has issues with states or other laws or
8 technology or competitive questions as to whether they can
9 engage in it. So I believe it's clear, your Honor, that the
10 settlement here satisfies the standard for 23(b) (2) and as
11 that applies under Dukes.

12 There was some comments with respect to the Rules
13 Enabling Act. And on that, your Honor, the Supreme Court has
14 healed that procedural rules such as Rule 23 do not violate
15 the Rules Enabling Act even when they have incidental effects
16 on substantive rights. And this dates right back to 1941 in
17 the Sibbach versus Wilson case where the Supreme Court
18 enunciated the following test: The test must be whether a
19 rule really regulates procedure - the judicial process for
20 enforcing rights and duties recognized by substantive law and
21 for justly administering remedy and redress for disregard or
22 infraction of them.

23 Then --

24 THE COURT: Do you think incidental effects includes
25 the potential effect on 20 percent of the merchants in the

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1 United States? Is that incidental to a rules change or is
2 that a substantial potential effect? I mean, isn't it a
3 question of how you define incidental effects?

4 MR. KOROLOGOUS: I think there is certainly an issue
5 with respect to incidental effects. The question I think here
6 is what are those effects. Here we've got merchants who say
7 they have arbitration clauses. That's what the basis of the
8 Rules Enabling Act argue. That question goes to simply
9 whether they can litigate. Their request is they want to opt
10 out and be able to litigate.

11 In the arbitration they claim in these objections.
12 But that's no different than any other litigant. Just because
13 you don't have an arbitration clause doesn't mean you do not
14 have a right to litigate. And every opt-out request is a
15 request to be able to litigate on their own. Some do not even
16 bring a claim. Others can bring a claim and seek better
17 relief.

18 THE COURT: They're saying it's the tail wagging the
19 dog here, that the class members who are bringing this -- the
20 punitive class members who are bringing this litigation do not
21 have a level of interests that the objectors have in terms of
22 consequences of being limited as to how they can proceed
23 if they have a claim. I mean, isn't there something that --
24 you know, isn't there a balancing that needs to be done in a
25 situation like that? You know, I could as an attorney bring a

1 class action with a handful of representative members of the
2 class and then I make a deal with the defendant and claim that
3 the class is adequately represented and I can simply negotiate
4 away the rights that the other punitive class members have and
5 the effect of negotiating those rights away has much greater
6 consequence to the objectors than it has to the original class
7 members who brought the litigation? Is that -- I mean, how
8 would we deal with that?

9 MR. KOROLOGOUS: I think, your Honor, that question,
10 rather than just to the Rules Enabling Act, goes to broader
11 question of application of a 23(b)(2) class in this case at
12 all, including represent --

13 THE COURT: Right, I jumped to that question.

14 MR. KOROLOGOUS: I just wanted to make sure that was
15 clear in my mind.

16 THE COURT: No, I understand what you're saying, but
17 I'm trying to deal with, you know, the heart of what the
18 objectors are saying.

19 MR. KOROLOGOUS: Certainly, your Honor. I think
20 there are two parts to that question, and I'll address the
21 first and likely leave most of the second to Mr. Friedman; the
22 second being whether he and his clients can appropriately be
23 representative of the other members of the class in its
24 entirety.

25 Related to that, of course, is the structural and

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1 procedural question of how you resolve that question and
2 whether that is applicable here which goes to the, again, the
3 question as in Dukes of what is the claim that is brought and
4 what is the relief that's being evaluated and should that
5 apply to the class. The claim is on behalf of all merchants
6 that are subject to this rule. Well, all merchants that
7 accept American Express or that might in the future are
8 subject to these rules. They have slight differens but not --
9 that get negotiated, as we've seen from some of the objectors'
10 statements here and also from the DOJ trial, but those
11 differences don't have differences on the issues that are
12 being resolved here on surcharging. American Express doesn't
13 allow differential surcharging under any agreement, negotiated
14 or not.

15 We have Honor All Cards rules with everybody on
16 every agreement, whether it's negotiated or not. That's the
17 way our rules are set up, that's what these claims are about,
18 that's what the class is seeking relief on and that's what the
19 relief is that is being granted. So from a structural
20 standpoint as to the relief, I believe that answer more than
21 satisfies Rule 23(b) (2) and Dukes.

22 Now, perhaps beginning to address the second issue a
23 little bit -- but again I think it's more Mr. Friedman's
24 issue -- some of the arguments I've heard about on, I believe
25 it was the Home Depot's counsel that sounded a lot like you

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1 can't have class actions. You can't have class
2 representatives unless you build an annex on the courthouse to
3 have all 6 million merchants come in. You simply can't get
4 there because there will be differences. There are always
5 going to be differences among the class. The issue is whether
6 the differences matter so that the class representatives
7 cannot adequately represent the interests of all parties that
8 are absent class members or class members that are there. And
9 the standards, we believe, are clearly met with respect to
10 that in this case, your Honor.

11 Your Honor, there was a, you recall, and it's
12 related to this point, at least with respect to the
13 arbitration clause issue, you recall the colorful chart with
14 many columns and many colors on it. And that, again, goes to
15 the question of whether there are differences among the class
16 that require differences to be dealt with and not dealt with
17 on a classwide basis.

18 But that kind of a chart could easily be created in
19 a case that has no arbitration clause, if you simply made it
20 about where can you go to get your relief. Well, that depends
21 on the case, is it a federal question or is it diversity. Do
22 you have diversity or not? That depends on what state you
23 live in compared to the defendant. How much your damages are.
24 Can you go to the court here in Brooklyn or do you have to go
25 to federal court in Los Angeles?

1 All of these things are differences that every
2 litigant faces. Just the mere fact that these litigants have
3 an arbitration clause does not give them some heightened
4 ability to get out of a properly constituted Rule 23(b) (2)
5 class.

6 THE COURT: Well, it's a question of what's being
7 given up too, not just what are they getting but what are they
8 not getting. And it may not be important to the class
9 representatives as to whether there are restrictions on future
10 litigation and other future remediation under the merchant
11 acceptance agreements. Right?

12 But it may be that the punitive class members who
13 are not the lead class members of the steering committee who
14 brought the case, that their ability to exercise their rights
15 will be disparaged in ways that the lead class members would
16 not experience simply by virtue of the nature of their -- of
17 the MDP's that they negotiated or other aspects of their
18 agreements with American Express, which give them certain --
19 currently give them certain rights in litigation or at
20 arbitration that are extremely valuable to them, which they
21 could not exercise. So it's a package, isn't it?

22 MR. KOROLOGOUS: It is a package. And the question
23 again, as stated in Dukes, is whether it is a uniform package
24 for the class, and here it is. The issue, for instance, with
25 respect to -- let me back up and again make clear so that

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1 there's no question of what the release does in this case. It
2 releases injunctive relieve claims. While it releases
3 steering injunctive relief claims, it's got an express
4 provision that whatever the outcome in the DOJ case, the class
5 members will benefit from them.

6 So while they've released their claims to bring
7 their own injunction for that, they will live with the DOJ
8 case. So there's no harm to them with respect to that unless
9 somebody could try to articulate that DOJ was not
10 appropriately capable to try the case in order to achieve the
11 ends that it was seeking, which again were with respect to
12 steering and not with respect to surcharging.

13 An example on that would be the individual merchants
14 cases. We believe, obviously, there are a lot of flaws in the
15 Department of Justice's case. But one of those flaws dows not
16 include what the individual merchant's flaw in addition is,
17 which is their requirement for them to achieve their case that
18 they prove a single brand market, where it's American Express
19 only, effectively arguing that American Express does not
20 compete with Visa, MasterCard or Discover.

21 So they have even an additional impediment. So I
22 don't think there is anybody that can come forward and say
23 that they are disadvantaged with respect to steering. They
24 are also not disadvantaged with respect to bringing any claims
25 for past conduct, meaning any conduct preceding when American

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1 Express implements the new rules.

2 All of that conduct under the current rules, to the
3 extent they believe and are able to prove in their individual
4 actions that American Express is both liable and that they've
5 suffered damages that are compensable, they will be able to
6 prove that. Now, we certainly think they will not succeed.
7 But they will have that right. That is not released.

8 What is released with respect to damages or relating
9 to damages for future conduct where we act consistent with our
10 new rules. There would be no incentive for us or any other
11 merchant settling an injunctive relief class if it had to face
12 damages for following the injunction that gets approved by the
13 court, as it must be. There is simply no incentive to that.
14 Judge Gleeson directly addressed that, that there would be no
15 such incentive. Other courts have addressed that as well.

16 And the release of those future damages is not
17 inconsistent with Dukes. I believe I heard one objector say
18 damages may not never be released under Dukes. That's not
19 what Dukes says. Dukes expressly leaves open the possibility
20 of the release of damages that are incidental to the
21 injunctive relief, and nothing could be more incidental than
22 to say that a party should suffer a damages claim against it
23 for following the injunction that is permitted by the court to
24 settle the case.

25 THE COURT: That's why it's extremely important that

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1 in assessing the proposal that the overall scope of the
2 agreement be such that the objectors that all of the class
3 members, including the objectors, will prospectively be
4 treated fairly and be able to protect their rights, because
5 the preclusion of certain types of remedies in this agreement
6 make it clear that the ability of these objectors to vindicate
7 certain rights, potentially, may be foreclosed.

8 And that's a matter of great concern, particularly
9 when you have a class that's allegedly millions of parties
10 strong. And we've got 20 percent of the merchant group, in
11 terms of sales or operations, you know, sitting in the
12 courtroom saying that they think this is unfair to them.
13 That's a very large percentage of a nationwide class of
14 merchants. I mean, you can add up all the restaurants in
15 America and you're not going to come close, I think, to the
16 group that's objecting in terms of their position in the
17 overall marketplace in the United States.

18 That's surmise on my part. I love restaurateurs.
19 My family comes from the background of restaurateurs. Maybe
20 your family.

21 MR. KOROLOGOUS: It does indeed, your Honor.

22 THE COURT: So I'm not disparaging them
23 individually, I'm just saying collectively what do they
24 account for as opposed to all of these objectors, and isn't it
25 important that I take very careful consideration of the

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1 arguments that they have made that the settlement doesn't
2 adequately protect their rights going forward?

3 MR. KOROLOGOUS: It is important to look at that,
4 your Honor. And again, there are a couple of ways that the
5 court needs to ensure that that exists here, and it does.
6 First is, again, Rule 23(b)(2), in its application to make
7 sure that there is adequate representation and uniformity of
8 the relief.

9 The other is to get a look at the scope of the
10 release and whether that is an appropriate scope of releasable
11 claims. And to solve that issue, including because it was
12 such a hot button issue in the 1720 case where there was a lot
13 of dispute about the scope of release and the way that release
14 was written -- and I believe that one is actually a lot longer
15 than the one here -- goes to the question of what the
16 identical factual predicate is. And it is clear under the
17 case law and it is undisputed by everybody in this case, as
18 well as everybody in the 1720 case, that a release may release
19 claims consistent with that doctrine. And that's exactly how
20 the release in this case is phrased. So if it's identical
21 factual predicate, if it's meets that doctrine, it is
22 released. If it does not meet that doctrine, it is not
23 released. We solved that structurally --

24 THE COURT: What's the status of the 1720 case?

25 MR. KOROLOGOUS: The appeal briefs have gone in. I

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1 believe the response briefs are due about a month from now and
2 then there will be period of two to four weeks or so after
3 that for reply briefs.

4 THE COURT: For what, for reply?

5 MR. KOROLOGOUS: For replies.

6 THE COURT: And then there will an argument --

7 MR. KOROLOGOUS: An argument will be scheduled and
8 then --

9 THE COURT: And we'll find out some day if the
10 circuit agrees with Judge Gleeson?

11 MR. KOROLOGOUS: I suspect it will be argued and
12 decided sometime in 2015.

13 THE COURT: So I have no way of knowing at this
14 point whether the circuit court is embracing -- will embrace
15 or not embrace the outcome of 1720 at this time?

16 MR. KOROLOGOUS: In its totality, I think that's
17 right.

18 THE COURT: It would have been helpful. But since
19 they haven't received the complete package yet, I can't really
20 say anything about the delay. The delay is that it's the
21 normal course of litigation.

22 MR. KOROLOGOUS: Correct, your Honor. Let me
23 address a few other points that came up. There were some
24 comments by some merchants that the relief here because it
25 requires parity surcharging will actually set things back

1 because it will allow American Express to raise its rates.
2 But parity surcharging exists today under American Express's
3 rules. American Express does not have a no surcharging rule,
4 it has a parity surcharging rule. American Express's rates
5 are going down, they're not going up. So we don't think that
6 argument gets them anywhere.

7 THE COURT: Where are Visa and MasterCard on parity
8 surcharging?

9 MR. KOROLOGOUS: They now have the 1720 settlement
10 and they've had that since, whenever that was, the beginning
11 of 2013 I think that went into effect.

12 THE COURT: Have any of their merchants engaged in
13 parity surcharging?

14 MR. KOROLOGOUS: I believe there is information in
15 the record here that there have been very few engaging in
16 surcharging among those merchants that do not accept American
17 Express, which is where they are able to do that because --

18 THE COURT: Right.

19 MR. KOROLOGOUS: -- there's the what Judge Gleeson
20 called the American Express problem. We don't necessarily
21 like that phrase but that's what he called it.

22 THE COURT: I understand what he's saying.

23 MR. KOROLOGOUS: But that issue applies to the vast
24 majority of merchants, about six out of nine depending on how
25 you count. But, again, that is the problem that is solved by

1 this issue on this settlement.

2 THE COURT: So as to those 4 billion merchants who
3 did not take American Express -- was it 4 million?

4 MR. KOROLOGOUS: I think about three.

5 THE COURT: Three. Who do take Visa and MasterCard
6 and Discover, have they had the right to parity surcharge
7 since Judge Gleeson's decision?

8 MR. KOROLOGOUS: Yes, your Honor, they've had the
9 right to engage in a variety of different surcharging and
10 steering as well as a result of the Department of Justice
11 settlement. You will recall that was an issue where we talked
12 about the statements made by Christine Barney at the time the
13 settlement was announced.

14 THE COURT: Oh, yes, thanks for reminding me.

15 MR. KOROLOGOUS: And that -- you know, that was an
16 issue in that case as well, whether merchants had engaged in
17 that steering. But, similarly, those same merchants are among
18 the merchants who would have the ability to take advantage now
19 of the changing rules of 1720 because they are not subject to
20 what Judge Gleeson called the American Express problem.

21 THE COURT: So do we know how many of them have
22 rushed off to engage in --

23 MR. KOROLOGOUS: We don't know.

24 THE COURT: Okay.

25 MR. KOROLOGOUS: Your Honor, there was something

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1 that Mr. Arnold said in his remarks about Judge Gleeson that
2 reminded me of a case where you asked me about other cases
3 that have involved settlements that have crossed a broad swath
4 of industries and that is another case against Visa which is
5 the Wal-Mart versus Visa case which involved -- it ended up
6 having a class certified under 23(b) (2), as well as 23(b) (3).
7 The case settled.

8 That was a case about allowing merchants to choose
9 not to accept debit cards and only accept credit cards.
10 Before that case, Visa and MasterCard rules had an Honor All
11 Card rule that required the acceptance of debit cards if
12 merchants also accepted credit cards. So again, that covered
13 some 4 million merchants or so at that time. But, again, it
14 crossed a similar swath of industries because, again, it was
15 merchants that accepted Visa and MasterCard.

16 THE COURT: Was that a settlement? Was there a
17 settlement?

18 MR. KOROLOGOUS: It did settle, your Honor.

19 THE COURT: And were there major objections borne
20 against that settlement?

21 MR. KOROLOGOUS: I don't recall. I believe some
22 others here were involved in that. I think Mr. Friedman may
23 be able to answer some questions with respect to that.

24 THE COURT: All right. Thank you.

25 MR. KOROLOGOUS: Mr. Arnold also took on my

1 representation to your Honor about their damages claims and
2 their damages theory in this case where I indicated that their
3 damages theory was based on PIN debit rates and using that as
4 a baseline.

5 And Mr. Arnold spoke some of Mr. Vellturo of -- I
6 can't recall right now whether it's Professor or Dr. Vellturo,
7 who was their expert. It is Dr. Christopher Vellturo. And I
8 don't think there should be any doubt about what the
9 plaintiffs' damages theory is and that it's based on a
10 baseline end of it.

11 And for that, while there are a variety of cites in
12 both American Express's papers in this settlement approval
13 process as well as in the class papers, I would refer your
14 Honor to July 3, 2013 surrebuttal report of Dr. Christopher
15 Vellturo. And specifically I'll quote from paragraph 213
16 which is in the section about the overcharge assessment where
17 he is addressing criticisms of my baseline AmEx but-for fee.

18 He ends that sentence with the following sentence:
19 However, what really matters is that PIN debit rates have
20 always been low and in the but-for world merchants could have
21 credibly used differential pricing of AmEx vis-a-vis debit to
22 shift transaction volumes to this less costly form of payment
23 and drive down AmEx merchant fees."

24 So in this very case with these very objectors
25 claiming that there's no benefit by being able to shift

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1 customers from credit to debit, their own expert disagrees
2 with their presentations here.

3 Your Honor, I should also note, I think it was one
4 of the earlier slides that Mr. Arnold put up about surcharging
5 and discounting and whether there's a difference there.
6 Apparently, the Department of Justice thinks there's a
7 difference, since they brought a case that sought to overturn
8 or undo American Express's rules prohibiting differential
9 discounting but they did not seek to overturn American
10 Express's rules with respect to differential surcharging.

11 Your Honor, you will recall that I mentioned the
12 Giuliani case, it's actually Joel A. versus Giuliani. That is
13 a case that should help the court with respect to the issue of
14 future class members because that is a case that expressly
15 included both current and future class members. I think it
16 involved childcare industry. But it was injunctive relief
17 that could apply both to existing members as well as future
18 class members. I believe that responds to some of the issues
19 raised including by the Buckeye Institute.

20 One additional point based on, I believe it was the
21 Home Depot presentation. I want to make clear that what Judge
22 Gleeson approved in 1720, the release there did expressly
23 include the release of future damages claims for claims that
24 would follow the rules. And that's, I believe found in
25 paragraph 68 of the Visa/MasterCard settlement agreement in

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1 1720.

2 May I have a moment, your Honor?

3 THE COURT: Sure.

4 MR. KOROLOGOUS: Two more points, your Honor.

5 First, a simple reference point with respect to the government
6 arguments. We've addressed those with one short final section
7 of our brief. And I refer the court to American Express's
8 position with respect to the government there.

9 The issue is really, in our view, that yes, the
10 Department of Justice has to act on behalf of any agency of
11 the United States, but that's to conduct litigation. And here
12 the way the government would be conducting litigation is to
13 either appear as a party, and they're not a class
14 representative and therefore not a party, or to object. And
15 they've stood here today and objected. The Department of
16 Justice has, we believe, fulfilled the rules consistent with
17 that. We don't see anything in the cases or in the statutes
18 that allow the government to have the ability to claim they're
19 not part of the class inconsistent with the arguments the
20 government has made. But I refer your Honor to the issues
21 there.

22 THE COURT: Are you aware of any cases where the
23 government has been included as a member of a class in a
24 (b) (2) class situation?

25 MR. KOROLOGOUS: I'm not sure it was (b) (2), I think

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1 it was a (b) (3) class. There is the Shaw case that we cite in
2 our papers on that.

3 THE COURT: You would be knocked out in a (b) (3)
4 situation.

5 MR. KOROLOGOUS: You can be. But the point there,
6 your Honor, is that while they were not dragged into that,
7 they chose to be represented by the class without going
8 through the procedures that they say are required under those
9 statutes. And so we believe that that case supports our
10 position. I do agree with the government.

11 We've not been able to find a case where the
12 government has been required to be included in a class by that
13 principle. But in that one case we did find that it is
14 somewhat analogous they voluntarily chose to be represented by
15 class counsel.

16 THE COURT: That's a little different from what we
17 have here.

18 MR. KOROLOGOUS: It is, your Honor.

19 Finally, your Honor, with respect to some of the
20 arbitration arguments here and sort of back to the Rules
21 Enabling Act points to some extent. I think it's important to
22 remember again, all of these objections that are seeking
23 opt-outs are essentially saying they want to go on their own.
24 But that is, again, a right that any litigant would have,
25 whether they have an opt-out, whether they have an arbitration

1 right or not. None of the contracts that they cite, we didn't
2 see a column on the colorful chart, grant an opt-out right.

3 Indeed, there are cases we cite in our papers that
4 say you cannot contractually enter into an opt-out right. And
5 the arguments that they claim a right to arbitration, those
6 are rights that can be impacted by Rule 23(b)(2). That is the
7 kind of conduct that can occur.

8 I think it's important to note that these merchants
9 did not bring an arbitration. This case has been around for
10 years. There's been a great deal of notoriety with respect to
11 it, including because of its interplay with 1720, where there
12 was not only a great deal of notoriety but there was the
13 settlement, there was the notice to all class members which is
14 an overlapping and broader class with perhaps a handful of
15 people that accept only American Express and not Visa and
16 MasterCard, where they got notice not just of the existence of
17 this kind of litigation, the Visa/MasterCard case, but that
18 the case there was to involve a 23(b)(2) non-opt-out, in a
19 case where they would be bound by the information -- by the
20 settlement that was included there.

21 And despite that, these merchants did not bring
22 individual claims, they did not bring the kind of claim that
23 might put them in a different situation, might have different
24 arguments, but we don't have to deal with them if they had
25 brought claims that we were trying to resolve under the

1 arbitration. But that's not an issue the court needs to fix.

2 These litigants did not exercise those rights and
3 have not raised them until they come in to court here with
4 respect to objections in a very different context than
5 bringing a claim on their own to exercise those arbitration
6 rights for these rules American Express has had, and your
7 Honor heard, for decades.

8 THE COURT: But on the other hand, the original
9 cases brought before me were brought by the individual
10 merchant plaintiffs, that's how we got here.

11 MR. KOROLOGOUS: In this court --

12 THE COURT: It may have gotten transferred from
13 Judge Gleeson who didn't accept the related -- alleged
14 proposed related status of those cases so that he would handle
15 them.

16 But Italian Colors is a Southern District case.
17 Right? That case belonged to Judge Daniels. Right?

18 MR. KOROLOGOUS: Mr. Friedman can more clearly
19 address than I can. His case existed before the case of the
20 individual merchants that's before your Honor.

21 THE COURT: Not here, though.

22 MR. KOROLOGOUS: Not in front of your Honor, that's
23 correct.

24 THE COURT: Judge Daniels sent me that case. Isn't
25 that right?

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1 MR. FRIEDMAN: I don't want to step
2 on Mr. Korologous.

3 THE COURT: No, I'm not done with him.

4 MR. FRIEDMAN: Okay. He knows the answers to this
5 anyway.

6 MR. KOROLOGOUS: There was --

7 THE COURT: How is that important to me in deciding
8 this?

9 MR. KOROLOGOUS: Because the -- because the class
10 has had its case longer than anybody else. Nobody, other than
11 the individual merchants that are here, has brought a claim.

12 THE COURT: Obviously, the individual merchants
13 didn't seize the moment to join in in the case in the Southern
14 District. Right?

15 MR. KOROLOGOUS: Right, they tried to do it --

16 THE COURT: They brought an individual case in the
17 Eastern District that they thought was going to go to Judge
18 Gleeson and it ended up with me. And then I got the MDL.

19 MR. KOROLOGOUS: You got benefits from both courts.

20 THE COURT: I'm so lucky. But my point is, if they
21 had -- if they thought that they could be adequately
22 represented in the other district, in the other case, they
23 would have been there but they weren't.

24 MR. KOROLOGOUS: Well, my point in mentioning the
25 individual merchants is to carve them away. There's nobody

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1 that is here arguing an arbitration clause, the individual
2 merchants are not, because they've got their claims in court
3 before your Honor without impact of arbitration clauses some
4 of which they have. But American Express has agreed not to
5 invoke them for their claims.

6 So everybody that is here before your Honor raising
7 an arbitration clause, every single one of them did not bring
8 their own claim in any court at any time despite the long
9 pending nature of the class.

10 THE COURT: Let me just ask you this, if you look at
11 this proposed settlement agreement, AmEx gets out of it, or
12 the result is that there is some uniformity in the
13 anti-surcharging rules. In other words, there are limits.
14 Parity surcharging becomes the approach that's used under this
15 agreement. Right?

16 And so there's a certain uniformity of how
17 surcharging issues are handled, but American Express still
18 retains its MDPs and it still retains the ability to negotiate
19 another critical element of the relationship between the
20 merchant and AmEx and so -- and that's individually negotiated
21 with large merchants. Right?

22 MR. KOROLOGOUS: Yes.

23 THE COURT: So what you end up with is in certain
24 respects AmEx basically gets the best of both worlds. It can
25 continue to negotiate the MDPs but the merchants can only

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1 implement a type of surcharging which is, according to some,
2 of little or no real benefit to the merchants.

3 So the question is: Is this a fair settlement? If
4 you get to do everything that you think is important that I
5 heard seven weeks of testimony about, but the merchants get
6 parity surcharging, which is of dubious or questionable
7 benefit to the merchants? And I'll take that up with
8 Mr. Friedman as well. But you might as well answer since the
9 benefit is to American Express allegedly.

10 MR. KOROLOGOUS: Your Honor, first of all, with
11 respect to some aspects of our MDPs, the ability of American
12 Express to go forward with respect to those will be decided by
13 your Honor, in appellate courts with respect to the DOJ case
14 insofar as steering.

15 THE COURT: Let's say they haven't met their burden
16 for the sake of this discussion.

17 MR. KOROLOGOUS: Okay, I'll agree with that.

18 THE COURT: Well, no, for the sake of this
19 discussion.

20 MR. KOROLOGOUS: I understand. I understand.

21 THE COURT: I don't even have your papers yet.

22 MR. KOROLOGOUS: Tomorrow, your Honor. We're
23 working on them over here as we speak.

24 THE COURT: Where is Mr. Orsini?

25 UNKNOWN SPEAKER: Working on them, your Honor.

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1 THE COURT: Yeah, he's not here, which worries me.

2 MR. KOROLOGOUS: It worries all of us.

3 THE COURT: You can tell him.

4 But you understand my point, that, let's say the
5 government is not successful and all we're left with here is
6 the class settlement agreement and some litigation over
7 damages from the individual merchants plaintiffs that goes to
8 damages which have already allegedly been experienced.

9 MR. KOROLOGOUS: I believe the right way to look at
10 it, your Honor, at least from American Express's perspective,
11 is that we have with this settlement some limitations on what
12 we can require under our agreement with merchants. Regardless
13 of whether it's negotiated or not, we will have limitations on
14 what we can do. We will have to allow merchants to
15 differentially surcharge as between the group of credit and
16 charge cards on the one hand where there needs to be parity
17 surcharge, but they may need to surcharge that group
18 differently than they do debit. And that is a change from
19 what American Express does today. And so that ratchets back
20 the MDPs by that amount.

21 You're correct that American Express could still
22 negotiate but it cannot take that benefit away from the class
23 because we've got a settlement agreement, at least not without
24 blowing our release. We can't take that benefit away from the
25 class.

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1 And so, yes, we will continue as we have to neglect
2 agreements, as we must, unlike Visa and MasterCard that just
3 impose rules. But we will have limitations on what we can do
4 with that. Just like if we were to lose, arguendo, the DOJ
5 case, we would have further limitations on what we could
6 negotiate with respect to steering.

7 THE COURT: If American Express implements and
8 produces a new product, a debit product, how would that
9 potentially impact the future rights of merchants except the
10 American Express, under this agreement, if it at all?

11 MR. KOROLOGOUS: Under the agreement, it depends on
12 the kind of debit card that is introduced. If it is what we
13 define as a traditional debit card that draws on a deposit
14 account, that is a card that merchants would not need to
15 accept. So that would be a change in our Honor All Cards
16 rule, that merchants could chose, if they don't like that
17 card, if they felt -- for instance, I believe this was one of
18 the reasons that the class asked for this in the agreement.
19 If they felt that was a channel by which American Express was
20 trying to circumvent the issues with respect to surcharging
21 that we settle in here with respect to credit and charge cards
22 compared to debits by packing in a traditional debit card that
23 has awards, merchants could choose not to accept that. They
24 could say, look, that's a high priced debit, I don't want to
25 deal with it because you're running rewards through that and

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1 choose not to, despite what has been our Honor All Cards rule
2 before that any product we issue has to be accepted by
3 American Express if they chose to accept any cards.

4 THE COURT: Is that realistic for the consumer, that
5 if you take your -- assuming you have more for that product,
6 you take your AmEx debit card into a merchant who accepts the
7 American Express card and the merchant then says, no, we don't
8 honor that American Express card, are you willing to do that?

9 MR. KOROLOGOUS: Well, I think, your Honor, that it
10 is at least sufficiently possible for merchants to do that,
11 including because they would have the right perhaps with just
12 a sign that says we accept American Express but we don't
13 accept this American Express debit card, that what it does is
14 imposes discipline on American Express not to engage in that
15 conduct. And so I believe this was described by the class in
16 its brief as a safety valve stop to prevent American Express
17 from having that means of circumventing the other rules.

18 So --

19 THE COURT: It also flies in the face of the
20 repeatedly stated comments by witnesses in the government
21 trial that it's important that the American Express card be
22 welcomed at merchants who agree to accept the card.

23 MR. KOROLOGOUS: Right. And I don't want to speak
24 on behalf of the business, but I'm sure based on that
25 testimony and my knowledge of the business, American Express

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1 would not want to create the kind of confusion that that would
2 create by welcome acceptance by having some cards that
3 American Express has out there that are not accepted.

4 THE COURT: Right, I understand.

5 MR. KOROLOGOUS: So we would not try to force it.

6 THE COURT: So I think it's really -- it's a
7 provision which is there but really doesn't have any immediate
8 possibility of being implemented.

9 MR. KOROLOGOUS: Right. We don't think it's going
10 to be an issue but I do believe it provides some benefit the
11 way Mr. Friedman negotiated it to prevent American Express
12 from having an end run.

13 THE COURT: Okay.

14 MR. KOROLOGOUS: Thank you, your Honor.

15 THE COURT: Thank you very much.

16 Mr. Friedman, you get the last word.

17 MR. FRIEDMAN: Thank you, your Honor.

18 I think a lot of the discussion comes down to
19 adequacy of representation. And the question of the tail
20 wagging the dog is an adequacy representation question. And,
21 you know, we have a different view on the tail and the dog to
22 start with. Okay?

23 THE COURT: Well, who are you -- who are
24 representative clients for the class?

25 MR. FRIEDMAN: The representative clients --

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1 THE COURT: Who are the companies that initiated all
2 of this?

3 MR. FRIEDMAN: This was initiated -- in addition to
4 the Marcus Corporation that's been discussed here today, a
5 couple of -- there's two restaurants, the Italian Colors
6 restaurant.

7 THE COURT: We know about them.

8 MR. FRIEDMAN: Right. Animal Land, a pet relocation
9 company. There's a liquor store, a gas station. There's a
10 handful of small merchants. Those are mom-and-pop operations
11 with the exception of Marcus which is a New York Stock
12 Exchange traded company. It's a mid to large size hotel
13 operator. It operates Hilton, Marriotts and others.

14 THE COURT: In other words, they have franchises to
15 operate hotels?

16 MR. FRIEDMAN: Right. They also have their own
17 brand named hotels. They have good resorts in Wisconsin and
18 Las Vegas under their own brand.

19 THE COURT: My question is not to disparage any of
20 their interests in bringing this litigation. But in terms of,
21 you know, whether they adequately represent, you know,
22 8 million merchants, including the merchants who are
23 objecting, that's a question.

24 MR. FRIEDMAN: So they brought this case and started
25 this, brought the case in the first instance in 2006, two and

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1 a half years before the individual merchant plaintiffs did,
2 and it was in front of Judge Pauley. You remember that?

3 THE COURT: Oh, I remember that. Both Judge Pauley
4 and Judge Daniels --

5 MR. FRIEDMAN: He wanted to be on the Brooklyn
6 Bridge.

7 THE COURT: -- have been very enthusiastic about my
8 handling of this case.

9 MR. FRIEDMAN: Yes, right. Right. And so we
10 brought this to get relief for all merchants because we
11 thought that this is an area where it's not just American
12 Express's business imperative that this be uniform but there's
13 an -- that there are values to the universality. We walked
14 through a bunch of that in our paper. We thought it's
15 important to have the broad relief.

16 So the question that arises, the legal question, to
17 put this into a legal framework is, is there adequacy of
18 representation. Because we're not using these words
19 colloquially. Right? We're using them in the sense of what
20 does the Second Circuit mean when it talks about adequacy of
21 representation, what is it under the law.

22 And the Second Circuit has a -- and I'm going to
23 quote from the Joel A. versus Giuliani case that Mr --
24 actually, this quote is to the Wal-Mart case at the Second
25 Circuit which is quoting Joel A. And it's, the Second Circuit

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1 has considered whether a subset of a class can ever lack
2 adequate consideration, adequate representation when the lead
3 plaintiffs of that class possessed the claims of that subset.

4 So it all comes down -- I know you've seen this in
5 the briefing. It all comes down to whether we possess the
6 same claims. And the answer is we possess the same claims.
7 Every case that was adverted to by the objectors as being a
8 case where there was -- where adequacy of representation was
9 found lacking, every single one is a case where the
10 representative plaintiffs didn't possess the same claims as
11 the absent class members, as the objecting class members.

12 There is a case, I think it was Home Depot, I might
13 be wrong. It was talking about Stephenson versus Dow
14 Chemical, one of the Agent Orange cases, and you have there a
15 class of people who had already gotten sick from their
16 exposure to the product. And they reached a settlement not
17 only on behalf of themselves but also on behalf of those
18 people for whom the illness hadn't manifested. And they took
19 all the money for the people who were already sick and set
20 aside none for the others.

21 That's the same fact pattern as in Ortiz versus
22 Fibreboard, a Supreme Court case, and Super Spuds, the Second
23 Circuit. This isn't that. This isn't that. So to find that
24 adequacy of representation is lacking, you have to find that
25 we don't possess the same claims.

1 You know, Home Depot, if it wants to go forward, has
2 the ability to go forward and press a claim seeking
3 differential surcharging under whatever dispute resolution
4 provisions it has in its agreement, arbitration, court, it
5 doesn't matter. That's a lesson I absorbed from Justice
6 Scalia, that these are all equal in all of these different
7 forums, it doesn't matter where. So they can go ahead and
8 press their claim for differential discharge. Well, so can
9 Marcus. So can Italian Colors. So can Animal Land. And it's
10 not just that they have the formal legal technical ability to
11 do it. We shouldn't have doubted that they will do it and
12 they would do it.

13 Animal Land, as I said in my opening remarks,
14 started what became MDL 1720 when it filed a case for
15 injunctive relief only against Visa in 2005. Italian Colors.
16 Nobody should doubt the resolve of these merchants. Nobody
17 should doubt how serious they are about controlling their
18 acceptance costs. They've been out in front of this from day
19 one. They're out in front of the cases that are attacking the
20 state statutes. Those aren't money makers.

21 THE COURT: I understand. But it may not be as
22 important to them to give up a right in the future as it is to
23 some of the other members.

24 MR. FRIEDMAN: I would respectfully disagree. It
25 might not be as remunerative.

1 THE COURT: As remunerative?

2 MR. FRIEDMAN: It might not be as -- it's not worth
3 as much. I'm going to agree with you absolutely,
4 unconditionally, it is not worth as much by orders of
5 magnitude to Italian Colors Restaurant to give up the rights
6 as it is to Home Depot. I agree with that.

7 THE COURT: Okay.

8 MR. FRIEDMAN: But legally where are we? The
9 question is, is there adequacy of representation? And there
10 is. What these merchants have decided, each of them has the
11 same ability to go forward and seek to get their differential
12 surcharge rights, is it's not worth it. It's better to take
13 the bird in the hand than the flock in the bush.

14 THE COURT: But once I approve this class settlement
15 agreement --

16 MR. FRIEDMAN: Yes.

17 THE COURT: -- they lose the ability to negotiate
18 other aspects in the future of their relationship with
19 American Express because some of their rights have been folded
20 into the agreement. Isn't that right?

21 MR. FRIEDMAN: They lose their right to seek
22 differential surcharging. And I think -- I'm just trying -- I
23 think that's what your Honor is saying. It's -- they lose
24 their right to go into the court, into arbitration, or
25 elsewhere and say, I want the right to do unfettered

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1 differential surcharging, that's correct. They're settling
2 for a second best, that's correct.

3 Six million merchants will get this second best and
4 there's a tremendous overstatement that's been repeated by
5 objector after objector here about the extent to which
6 differential surcharging is superior to parity surcharging.
7 The nomenclature itself is misleading. But the slides that I
8 put up earlier, there is a great deal of competition inside
9 the credit card industry that's going to be fomented by this
10 relief that we're calling parity surcharging.

11 THE COURT: But they also lose other rights, they
12 lose the right to challenge the Honor All Cards provision,
13 don't they --

14 MR. FRIEDMAN: Well, some --

15 THE COURT: -- and to challenge the MDPs, the
16 existence of the MDPs?

17 MR. FRIEDMAN: Right.

18 THE COURT: Which is the heart of the government's
19 case and the government might not win their case.

20 MR. FRIEDMAN: Not one person -- okay, can I take
21 those in pieces --

22 THE COURT: Sure.

23 MR. FRIEDMAN: -- because I think they're very
24 distinct. Not one objector has come in here and said they
25 have any interest remotely in challenging the Honor All Cards

1 rule. We had an Honor All Cards theory. We prosecuted it in
2 Marcus and we -- and there's just no question in the minds of
3 anybody who ever went forward with that theory that this
4 package of relief here solves that problem.

5 THE COURT: Let's talk about the MDPs.

6 MR. FRIEDMAN: Okay.

7 THE COURT: I have witness after witness in the
8 bench trial over the summer --

9 MR. FRIEDMAN: Right. Right.

10 THE COURT: -- who indicated their problems with the
11 MDPs.

12 MR. FRIEDMAN: That's right. So this is a really
13 unique situation. I know of no other situation quite like it.
14 But the situation is this: We have this trial, the United
15 States against American Express. They joined our party in
16 2010. We were thrilled that they did.

17 Now, in this settlement context, if they weren't
18 there could we have settled this case this way and just walked
19 away from the MDPs? Would we have? I don't think so. But
20 they do exist. And it's an understatement of the world to say
21 that this is a very able legal team. They are bringing --
22 they're bringing those claims. If they win those claims, it's
23 moot. If they lose those claims, why on earth should we think
24 that we would have done better?

25 THE COURT: Because you have market power as a

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1 class, don't you? I mean, what you're doing -- I'm just
2 playing devil's advocate here.

3 MR. FRIEDMAN: Okay.

4 THE COURT: What you're doing is you're
5 relinquishing to the government the negotiation or the
6 resolution of the MDP issue.

7 MR. FRIEDMAN: Yes.

8 THE COURT: And you're making a settlement with
9 American Express that doesn't include a resolution of the MDP
10 issue because you're relying on the government to be
11 successful.

12 THE PLAINTIFF: Correct. And if the government --
13 with the full understanding that if the government isn't
14 successful, we weren't going to be. That was our judgment.

15 THE COURT: If the government -- but if the
16 government --

17 MR. FRIEDMAN: On MDP.

18 THE COURT: If the government isn't successful --

19 MR. FRIEDMAN: Right.

20 THE COURT: -- would your agreement be fair to
21 the members of the class?

22 MR. FRIEDMAN: If the government isn't successful,
23 if the government isn't successful, then we cut the deal of
24 the century. Okay, if the government isn't successful, the
25 relief for the merchant class is just parity surcharging but

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1 no one was going to get anything.

2 If the government is unsuccessful in this case, they
3 have all of the advantages, their market power theory, the
4 ability -- you know, as opposed to drugstores and supermarkets
5 for whom American Express represents a very small portion of
6 their spend, the government can come in and they bring in
7 Discover and they're talking about the market, if anybody is
8 able to prevail on market power it's them.

9 Second, their case is an easier case.

10 THE COURT: I didn't understand the point about the
11 drugstores. What are you saying about the drugstores?

12 MR. FRIEDMAN: My point is that there's -- I
13 think -- I don't want to take anything from Mr. Arnold and
14 Mr. Slater's case, great lawyers and good friends.

15 THE COURT: Just tell me what your point is.

16 THE PLAINTIFF: My point is that -- well, my point
17 is simply that they have certain challenges. They have
18 clients for whom American Express represents a very small
19 percentage of their spending. And a jury -- I don't know what
20 inferences the jury is going to make.

21 THE COURT: Were you here when the chairman of
22 Walgreens came in and told us his story?

23 MR. FRIEDMAN: Yes.

24 THE COURT: Pretty compelling story about the power
25 of American Express in connection with insistence, wouldn't

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1 you say?

2 MR. FRIEDMAN: I would. So maybe that suggests that
3 all plaintiff groups should be in a position of winning here.
4 But recall the point that I was making was that our judgment
5 was that if DOJ is to not prevail on those claims, we have no
6 reason to believe that we would have prevailed on those
7 claims. And if that's true, we're not walking away from
8 anything.

9 THE COURT: Well, you made a big point about
10 differentiated as opposed to parity surcharging. Right? But
11 isn't it true that in Australia -- I know I'm opening
12 Pandora's box with Australia. But Australia there's a lot of
13 differentiated surcharging. That point was made by someone --

14 MR. FRIEDMAN: Mr. Slater made that point.

15 THE COURT: Yes.

16 MR. FRIEDMAN: We put in compelling evidence that
17 actually suggests that the vast majority of surcharging in
18 Australia is on a parity basis. Mr. Slater came in and they
19 put in evidence from the same source, credible also, that
20 suggests if you do the math that much less than what we were
21 saying is parity.

22 Nobody is asking your Honor to be the arbiter of
23 that. I don't think that that's necessary. What we do
24 know -- what we do know is absolutely undisputed is that huge
25 swaths of commerce in Australia entire industries, hotels, car

1 rental, air, are doing parity surcharging. And I just don't
2 understand for the life of me how we can sweep this evidence
3 under the rug.

4 Mr. Arnold came in here and said Australian evidence
5 is terribly important. Mr. Slater is relying on Australian
6 evidence. Their experts are relying on Australian evidence.
7 We're all looking at Australia evidence.

8 I think part of the problem, if I may stick my neck
9 out a little bit for better or for worse, is in Professor
10 Hemphill's report he placed a fair amount of reliance on the
11 work of the expert for 7-Eleven, and that was Professor
12 Hausman. He's a very well respected economist. And Professor
13 Hausman made some flat-out errors, and we pointed those out
14 respectfully, in response to Professor Hemphill's report.

15 Once you give due consideration to the undisputed
16 evidence you'll see that there is massive, massive parity
17 surcharging in Australia. And if even -- even -- even any
18 percent of that represents what we're going to see here in the
19 United States -- and I think you would see more parity
20 surcharging in the United States than Australia.

21 One quick slide, the Allen chart. You know, in
22 Australia there's a substantial premium in American Express's
23 rate over the rate of Visa and MasterCard. So that suggests
24 that people would want to surcharge differentially and not on
25 a parity basis.

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1 The picture in the United States is very, very
2 different. So --

3 THE COURT: I'm sorry, which? This is new.

4 MR. FRIEDMAN: Well, it's only new in its electronic
5 form.

6 THE COURT: No, it's new today.

7 MR. FRIEDMAN: It's new today, that's right. It's
8 in our slide. It was in our brief. I wasn't sure if that was
9 a joke.

10 THE COURT: Okay, that's fine. Well --

11 MR. FRIEDMAN: The -- we get even -- I don't know if
12 your monitor is as fuzzy as this one.

13 THE COURT: They're all the same.

14 MR. FRIEDMAN: That's the point, is that you've
15 got -- is that this is the surcharging that matters in the
16 United States, it's parity. And to the extent that you want
17 to introduce competition, if you're willing to surcharge, then
18 you can do exactly what I was talking about in my remarks here
19 this morning. Do this parity surcharging and cut deals with
20 Discover, cut deals with American Express, cut deals with
21 MasterCard, then you get to the same place.

22 THE COURT: Okay.

23 MR. FRIEDMAN: So another issue, much is being made
24 of just the fact itself that all these large merchants are
25 objecting. And I'm concerned that this fact is sort of --

1 become sort of a factor unto itself. And so I wanted to say a
2 couple of things about that.

3 One, Mr. Arnold stated that in 1720 all the
4 objectors that you have here, other than his group, they were
5 not objectors in 1720, but the 1720 objectors were objecting
6 in furtherance of a regulatory legislative agenda that they
7 wanted to see a capping of interchange rates, and they thought
8 that that was undermined by the 1720 settlement.

9 In objecting to the 1720 settlement, including now
10 on appeal of the Second Circuit, their top level argument is
11 that the surcharging relief we got in 1720 does us no good
12 because there's this American Express problem. So they need
13 the AmEx problem to stay exactly where it is, as a problem so
14 that they can defeat the 1720 settlement.

15 None of these objectors in here said anything to you
16 about having any genuine interest in wanting to, oh, the
17 release harm -- nobody came in and said, the release harms me
18 because I want to sue AmEx for X, the release harms me because
19 it's going to force me to give up my right to sue AmEx for Y.
20 It's just for some unstated thing in the future.

21 And I think that's telling. I think that's telling.
22 I think that you kind of put those facts together and you get
23 a picture that it's not that there's some genuine ground swell
24 of support against this deal, that this deal actually
25 prejudices their interest. It doesn't. It prejudices their

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1 ability to defeat the 1720 settlement which has been this
2 political cause celeb.

3 You asked earlier about if we had domestic
4 indications of interest in parity surcharging. And, you know,
5 because I tend to rely on all of the overwhelming evidence
6 that we have from Australia that you asked me about
7 domestically. So it's not going to rise to that level.
8 Obviously, we don't have the kind of data that we have from
9 Australia but just sort of anecdotally, the gas stations that
10 you engaged in colloquy with I think it was Mr. Shinder, you
11 know, gas stations that have -- whether you want call to it a
12 surcharge or whatever, you know, two prices, the dual pricing,
13 very common, we all know that. It's all parity. Have you
14 ever seen it vary by brand? You have?

15 THE COURT: Some say it's 10 cents, some say it's
16 15.

17 MR. FRIEDMAN: No, by brand.

18 THE COURT: By brand?

19 MR. FRIEDMAN: Yeah. So they'll say credit card, I
20 forget the prices today, credit card is 4.50, you know, cash,
21 whatever it is.

22 THE COURT: You got to find a new gas station.

23 MR. FRIEDMAN: Okay. So whatever it is, credit card
24 price.

25 THE COURT: What did you mean by that? I didn't

1 understand what you meant.

2 MR. FRIEDMAN: So it's a credit card price and cash
3 price.

4 THE COURT: Right.

5 MR. FRIEDMAN: But within credit price, have you
6 ever see Visa price, MasterCard price, Discover price,
7 American Express price? I'll bet not. Parity surcharging.

8 THE COURT: I see.

9 MR. FRIEDMAN: You see my point?

10 THE COURT: I see your point.

11 MR. FRIEDMAN: That's what surcharging merchants are
12 going to do. That's what they're going to do. This idea that
13 we need to be differential, it's not true, it doesn't happen.
14 That's not the way it works. You know how complicated it
15 would be to do it differently by brand? Your head would
16 spinning at the pump.

17 THE COURT: I would surmise as a consumer it might
18 depend on the ticket price of a particular item. If they're
19 buying a subzero refrigerator for \$10,000, you can bet that a
20 savvy wealthy consumer might want to do differential --
21 understand that there might be differential surcharging
22 because the differential surcharge could mean the difference
23 of hundreds and hundreds of dollars.

24 MR. FRIEDMAN: I totally get that.

25 THE COURT: I'm just saying.

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1 MR. FRIEDMAN: I share --

2 THE COURT: Over gasoline it's a different story.

3 MR. FRIEDMAN: So ex ante I would share that's
4 surmise. As a matter of evidence, high ticket is exactly
5 where we see parity surcharging in Australia. And I told you
6 it's literally undisputed fact that all of the hotels are
7 doing parity surcharging, all the airlines, not all, virtually
8 all. It's in our papers. That's literally undisputed.

9 THE COURT: Okay.

10 MR. FRIEDMAN: In the United States, livery, you
11 know the example that I give earlier --

12 THE COURT: Livery?

13 MR. FRIEDMAN: Livery, you know, car services.

14 THE COURT: Yeah.

15 MR. FRIEDMAN: So they're very often surcharging in
16 the US, parity. They don't do it differently by brand. I
17 mentioned the anecdotal example the other day. You come into
18 Newark airport, it's 5.50 extra. Not by brand.

19 But government official payments testified in this
20 case. They do, I call it surcharging, they call it
21 convenience fees. Whatever. But it's not different prices
22 for different brands.

23 THE COURT: Well, it was. They have two different
24 product lines. One is a parity surcharge, because they got
25 AmEx, according to the testimony, to lower its discount rate.

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1 And the other one they identified the online that if you use
2 your American Express card it costs you a different price --

3 THE PLAINTIFF: Right.

4 THE COURT: -- as a surcharger.

5 MR. FRIEDMAN: Okay. But --

6 THE COURT: I'm just saying --

7 MR. FRIEDMAN: Okay, I got you.

8 THE COURT: -- this is what happened.

9 MR. FRIEDMAN: DMVs, parking violation bureaus,
10 college tuition, all the people who are doing convenience fees
11 around the country, it's parity, parity, parity. So in terms
12 of domestic. And the illegal surcharges. As you know, we've
13 been leading those -- you may know. We've been leading those
14 cases challenging the state, anti-surcharging statutes,
15 including the one for Judge Rakoff here in New York.

16 And the Florida AG, for example, has a file on
17 people who have surcharged. They send cease and desist
18 letters. We got that from Florida request. We included that
19 evidence in our moving papers. Those are parity surcharges.
20 Those are the surcharges that people are doing. They're
21 illegal, but it tells you it's parity surcharging.

22 Mr. Slater and Mr. Arnold couldn't be more powerful
23 in coming in here and telling you surcharging matters, people
24 are going to surcharge, this tool matters. I agree with them
25 it matters.

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1 So the question becomes, are we talking about parity
2 surcharging or differential surcharging? All the evidence --
3 it's not all the evidence. Most of the evidence is on my side
4 of this one. Mr. Slater, I give him credit on some of the
5 Australian evidence that he mentioned before, I promise not to
6 drag your Honor into.

7 Mr. Korologous --

8 THE COURT: They're saying that the marketplace
9 should decide and you're saying you and American Express
10 should decide.

11 MR. FRIEDMAN: Well --

12 THE COURT: I mean, that's --

13 MR. FRIEDMAN: Neither of us have the option to say
14 that the marketplace should decide. If this is the only
15 option for 6 million merchants, that's the problem, that's the
16 problem. It would be easier if that weren't the case.

17 THE COURT: I'm only playing devil's advocate here.

18 MR. FRIEDMAN: I know.

19 THE COURT: I haven't reached any conclusions but
20 I'm trying to bring out all of these considerations so that I
21 have a better understanding of where everybody is.

22 MR. FRIEDMAN: Right. If there was any suggestion
23 about how the 6 million merchants could get relief with
24 whichever flavor, parity or differential, other than the
25 settlement, we would have heard of it. It ain't there. So

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1 it's this or nothing for 6 million merchants and those guys
2 want a little bit more for themselves. I don't begrudge them
3 that, but that's the story.

4 THE COURT: Do you think 6 million merchants even
5 know what's going on?

6 MR. CANTER: No, but do you think that -- I don't
7 know how many merchants there are in Australia, but do you
8 think they knew at the beginning? They didn't know either.
9 And then it happened. It happened. It started from nothing.
10 We know that they -- oh, surcharging is never going to get
11 hold -- take hold, and now it's undisputed that 40 percent of
12 Australian merchants are surcharging. By the way, that's one
13 of the facts that Professor Hemphill, with all respect, got a
14 little bit wrong based on Professor Hausman's misreading of
15 the evidence, which well --

16 THE COURT: You've pointed that out.

17 MR. FRIEDMAN: Pardon?

18 THE COURT: You've pointed that out.

19 MR. FRIEDMAN: Yeah, but I just wanted to tell you
20 that that's the place where it goes.

21 THE COURT: What other points would you like to
22 make?

23 MR. FRIEDMAN: Okay, Mr. Korologous stole my thunder
24 on cohesiveness.

25 THE COURT: That's fine.

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1 MR. FRIEDMAN: I want to talk about arbitration
2 really quickly, because counsel for the NRF was here and said
3 that it's very important that the NRF have its right to pursue
4 its ability to go into arbitration, that it values this right,
5 wants the ability to go pursue its right in arbitration. I
6 want to read to you what the NRF and its lawyers wrote to the
7 Supreme Court as an amicus brief. Just real quick, it's two
8 lines.

9 THE COURT: From which case?

10 MR. FRIEDMAN: My case.

11 THE COURT: Nice.

12 MR. FRIEDMAN: Sorry.

13 THE COURT: Which time?

14 MR. FRIEDMAN: Oh, which time at the Supreme Court?
15 The merits time, the bad one. The last time.

16 THE COURT: The last time?

17 MR. FRIEDMAN: Yeah. Yeah.

18 THE COURT: Go ahead.

19 MR. FRIEDMAN: Meaningful relief requires an
20 injunction on behalf of large groups of merchants. How do
21 you -- I don't know how you square that with what NRF was in
22 here saying today.

23 Meaningful relief requires an injunction on behalf
24 of large groups of merchants. And then they go on and they
25 say, the American Express agreement, quote, explicitly

1 precludes a merchant from seeking in arbitration any relief on
2 behalf of any other merchant. And so they say it totally
3 precludes the possibility of meaningful relief. So what
4 they're arguing for here is, please let us go pursue
5 meaningless relief.

6 I want to just touch on something Mr. Korologous did
7 and then I think I'm done, and that is the argument that from
8 all these dispute resolution clauses that you saw, the big
9 chart, according to, it was Mr. Canter, many of these
10 merchants have a right, a contractual right to be free of
11 class actions.

12 We bargained for the ability to get out of a class
13 action, they say. That's fine. The Shady Grove case that
14 Mr. Korologous mentioned, here is what that case was really
15 about. That case said there was a New York State statute that
16 gave the defendant a right to be free of class actions in a
17 troubled damage case. Don't you remember it came out -- it
18 was in CPLR, that you have the right to be free of class
19 actions.

20 And the argument, it went up to the Supreme Court,
21 was the defendant saying hey, we have a right, state law right
22 to be free of class actions. And the application of Rule 23
23 to this in the federal court, that violates the Rules Enabling
24 Act because that's a substantive right. Scalia said, no, it's
25 not. Justice Scalia said, no, it's not. No, it's not.

1 That's just Rule 23 doing its procedural thing being Rule 23.

2 And the fact that it might affect substantive
3 interests as in the Sibbach case that Mr. Korologous talked
4 about, that's of no moment, that's true in every case. And if
5 they're right on the Rules Enabling Act, then Rule 23(b)(2) is
6 a walking Rules Enabling Act violation, because in every
7 mandatory class settlement people's substantive rights were
8 foreclosed. You can't -- I couldn't think of one in which
9 that wouldn't be the case.

10 So that's all I've got.

11 THE COURT: Thank you.

12 MR. FRIEDMAN: Thank you.

13 THE COURT: Now, there are have been a number of
14 exhibits that have been offered here today and I need to give
15 them numbers so that the record is clear.

16 MR. FRIEDMAN: Oh, I'm sorry, your Honor, I don't
17 know, did we hand up our slides. We neglected to hand up our
18 slides, so may I approach?

19 THE COURT: Sure.

20 All right, I'm going to number them. Court's
21 Exhibit No. 1 is the class plaintiffs' presentation which I
22 was going to ask for hard copy on but I now have a hard copy.

23 Court's Exhibit No. 2 is the Target Objectors, the
24 NRF's presentation provided by Mr. Canter.

25 Court's Exhibit No. 3 is the individual merchant

1 plaintiffs' presentation provided by Mr. Arnold.

2 Court's Exhibit No. 4 is chart entitled quote,
3 Acceptance of AmEx at the top 100 retailers by 2011 US sales
4 which was presented by counsel for Southwest Airlines,
5 Mr. Slater.

6 Court's Exhibit No. 5 was a document entitled
7 Merchant Surcharging Australia, end quote, and dated
8 March 2007, which was also presented by Mr. Slater.

9 Court's Exhibit No. 6 is excerpts from the testimony
10 of Mr. Quagliata from the bench trial in the government's case
11 against American Express, which similarly was presented by
12 Mr. Slater.

13 I think that covers it.

14 (Court Exhibits 1 through 6 received in evidence.)

15 THE COURT: Anything else that I've missed? I don't
16 think so. Okay.

17 With regard to confidential sealed material, to the
18 extent that any exhibit provided to the Court includes
19 information that must remain confidential under the protective
20 order in this case, the party who proffered the document
21 should provide the court with a copy suitable for public
22 dissemination by this Friday, the confidential versions will
23 be filed under seal for the purposes of completing the record
24 of today's hearing.

25 Okay, is there anything further from the proponents?

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1 MR. FRIEDMAN: No, your Honor.

2 MR. KOROLOGOUS: No, your Honor.

3 THE COURT: Anything further from the objectors that
4 hasn't been said three or six times?

5 MR. FRIEDMAN: No, your Honor.

6 THE COURT: Okay, thank you everyone.

7 (Adjourned.)

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